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No. 03-1707

Supreme Court, U.S.
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In The

Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*,

Petitioners,

v.

MARY V. KING, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court reverse its precedents holding that the Second Amendment constrains only the actions of Congress, in the context of an order of the United States Court of Appeals for the Ninth Circuit affirming denial of a preliminary injunction, where that order does not conflict with these precedents or with the decisions of any other United States court of appeals on the same federal question?

2. Should this Court reverse its decisions on the scope of the right protected by the Second Amendment in the context of a challenge to a legislative decision by a County, a legal subdivision of the State of California, to prohibit possession of firearms on certain property it owns such as parks, historic sites and the fairgrounds?

3. Does a County ordinance prohibiting possession of firearms on County-owned property, including its fairgrounds, on its face, abridge First Amendment rights of trade show operators who choose not to patronize that venue after enactment of that ordinance?

LIST OF PARTIES

Petitioners:

Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows.[1]

Respondents:

Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty,

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[1] The plaintiffs in the original complaint were Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows ("Nordykes"). Excerpts of Record ("R"), Tab ("T") 1, page 1. Seven days after the trial court issued the order denying the preliminary injunction, the Nordykes amended their complaint, adding allegations and new plaintiffs. R, T16. On appeal, Petitioners "bootstrapped" the amended complaint into the appeal by captioning the appellate pleadings with the caption from the amended complaint and citing to the amended complaint. R, T1 at 1; T16 at 1. Respondents moved the Ninth Circuit Court of Appeals to strike the additional plaintiffs who were not parties to the action when the District Court entered the order appealed from, and also moved to strike references to the amended complaint. Respondents' Appendix ("Resp. App.") 9. The Ninth Circuit never ruled on that motion and never addressed the issue. However, in its opinion affirming the order denying the preliminary injunction, the Ninth Circuit refers only to the Nordykes. Pet. App. 1. In the proceedings before the California Supreme Court on the question certified by the Ninth Circuit, the County also moved to strike the same matter. Resp. App. 14. That Court also never ruled on the motion. In the opinion, the California Supreme Court refers to the exhibitors and patrons as "the remaining plaintiffs" (Pet. App. 84) but appears to treat the Nordykes as the only parties to the interlocutory appeal. Pet. App. 83, 84, 85. Accordingly, it is Respondents' position that none of the persons or entities captioned by Petitioners as Petitioners except the Nordykes themselves are proper parties to any of the proceedings pertaining to appeal from the order denying the preliminary injunction, including this Petition, and that this Court has jurisdiction only over the Nordykes.

LIST OF PARTIES – Continued

The County of Alameda, and the County of Alameda Board of Supervisors.[2]

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[2] Petitioners named in the original complaint The County of Alameda and the Alameda County Board of Supervisors and its individual Board Members, Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, in their personal as well as official capacities. Respondents have consistently taken the position that there is no basis for the Board of Supervisors or its members to be personally named because they are absolutely immune from personal liability for their legislative acts and are also protected by the doctrine of qualified immunity. Respondents preserved these objections by filing with the District Court on October 7, 1999, a Notice of Motion and Motion by Defendants to Dismiss the Verified Complaint for Damages, Injunction and Declaratory Judgment, or In the Alternative to Abstain; Memorandum of Points and Authorities in Support Thereof. The hearing on this motion is stayed pending the underlying appeal. Accordingly, without waiving the objections set forth in the motion, this Brief in Opposition refers to Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, The County of Alameda, and the County of Alameda Board of Supervisors collectively as "Respondents."

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STATEMENT OF THE CASE

After a failed attempt to obtain reversal of an order denying a preliminary injunction, Russell Allen Nordyke and Sallie Ann Nordyke dba TS Trade Shows[1] ("Petitioners") invite this Court to revisit its holdings on the incorporation doctrine, the Second Amendment, and separation of powers, in the context of their facial challenge to a County ordinance prohibiting firearms possession on one limited category of *County-owned* property. ALAMEDA COUNTY, CA GEN. ORD. CODE, Ch. 9.12, § 9.12.120. subd. (C) ("Ordinance"), Pet. App. 94-96. The challenged Ordinance regulates venues *owned* by the County of Alameda, such as parks, historic sites, and the fairgrounds, and was enacted after a mass shooting at one of the regulated venues. Pet. App. 94-96.[2]

Petitioners' Statement of the Case contains numerous misstatements of the facts and the law that are corrected below. However, the Statement also obfuscates three essential facts that merit this Court's immediate consideration. First, Petitioners' Second Amendment claim – which Petitioners never pleaded and never presented to the trial court at all – is presented to this Court in a factual vacuum, and was so presented to the Ninth Circuit Court of Appeals. As discussed below, this Court has a long and considered practice not to decide any constitutional question except with reference to the particular facts to which it is to be applied. The Court would be required to relinquish that practice here. The Petition, Judge Gould's separate concurrence, and the opinions dissenting from denial of rehearing en banc, are all devoid of analysis regarding why or how judicial recognition of an "individual right to bear arms" would have any bearing on this trade

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[1] *See* List of Parties, n.1, *supra*.

[2] The Ordinance also prohibits possession of ammunition on County-owned property. Pet. App. 94-95. However, that aspect of the Ordinance has not been a subject of Petitioners' challenge.

show operator's facial challenge to a garden variety prohibition of firearms on certain publicly-owned property.

Second, as noted above, the challenged Ordinance regulates only a limited category of the *County's own property*. It does not regulate throughout the unincorporated territory, a misimpression Petitioners have successfully conveyed to a number of the judges dissenting from denial of rehearing en banc.[3] The Ordinance applies only to property **owned** by the County, and excepts local public buildings. Thus, the property regulated consists principally of **open space venues**, such as county-owned parks, recreation areas and historic sites, and the County fairgrounds. Pet. App. 94-96.

Third, as set forth on the face of the Ordinance, it was enacted to **promote the public health and safety after a mass shooting on the County-owned fairgrounds** and in response to the high number of gun-related homicides and injuries in the County, all detailed in the findings. Pet. App. 94. The Petition attempts to obscure these legislative findings, referencing them only as "findings about the abstract evils flowing from guns." Petition ("Pet.") 27.

In short, by obfuscating where and why the Ordinance prohibits firearms possession, Petitioners have succeeded in sparking an academic discussion by a few Ninth Circuit

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[3] Some justices dissenting from denial of the petition for rehearing en banc apparently understood the Ordinance to apply throughout the unincorporated territory. *See Nordyke v. King*, 364 F.3d 1025, 1026, (9th Cir. 2004); Pet. App. 24, 26. However, the Ordinance applies only to property the County owns in fee or leases, wherever located; it does not apply generally to the unincorporated territory, most of which is owned or leased by private parties or public entities other than the County, and it does not apply to local public buildings owned or leased by the County. Pet. App. 94-96. The County owns no housing, therefore the Ordinance also does not apply to any residential property. By statute, the existence of a separate corporate body, the Housing Authority of the County of Alameda, precludes ownership of public housing by Alameda County. *See* Cal. Health and Safety Code §§ 34240, 34201(c), 34401(d), 34315(b), (e), (f). at Resp. App. 1-5.

judges who are anxious to debate the nature of the right protected by the Second Amendment. Petitioners now invite the Court to join in that debate but fail to show this Court why it is *necessary* to adjudicate that issue here.

More specifically, the actual facts of the case are as follows. Petitioners seek review from the order of the Ninth Circuit Court of Appeals affirming the denial of their motion for a preliminary injunction. Their underlying challenge is one to the facial validity of the Ordinance, which prohibits firearms possession on property owned or leased by the County. Pet. App. 94-96. Subject to certain exceptions, state law prohibits firearms possession in "local public buildings." *See* Cal. Pen. Code § 171b; Resp. App. 5-8. State law does not prohibit firearms possession on other County-owned property. *Id.* The Ordinance excepts local public buildings. Pet. App. 94-96. As a result, the principal venues subject to the Ordinance are open space venues, where crowds may gather, and where it is difficult to supervise access and activities.

Although the County exercises general police powers throughout the unincorporated territory,[4] most of which is owned or leased by private and public owners other than the County, the State has specifically charged the County with the duty of managing the County's own property in

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[4] Under California Government Code Section 23002, the County is a legal subdivision of the State. *See* Cal. Gov. Code § 23002 ("The several existing counties of the State and such other counties as are hereafter organized are legal subdivisions of the State."). Under the California Constitution, its police powers are as broad as those of the State except regarding those subjects over which the State has chosen to assert exclusive authority. *See* CAL. CONST. art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); *see also Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 140, 130 Cal.Rptr. 465 (Cal. 1976).

the interests of its inhabitants. Cal. Gov. Code § 23004(d).[5] In the proceedings in this case, the California Supreme Court has held that under Cal. Gov. Code section 23004(d) "a county is given substantial authority to manage its property, including the most fundamental decision as to how that property will be used. . . ." *Nordyke v. King*, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761 (Cal. 2002) (citing to *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746 (Cal. 2002)); Pet. App. 86.

The Ordinance was enacted after a multiple shooting on the County-owned fairgrounds, during the County fair. Twelve people, most under the age of 21 and the youngest of whom was 8 years old, were injured in this incident. Excerpts of Record ("R"), Tab ("T") 9, 2, ¶ 4. Emergency response teams, medical helicopters, and 157 law enforcement officers responded to the incident. R, T9, 3, ¶ 5. The alleged perpetrator was arrested in possession of a semi-automatic handgun and an extra ammunition clip and was charged. R, T9, 3, ¶ 6. The incident gave rise to nineteen tort claims, eleven of which could not be resolved and culminated in eleven liability lawsuits against the County. R, T13, 13-74. This incident, the high level of gun homicides and injuries in the County, and the fact that firearms rank as the leading cause of death for young people ages 15 through 24 in Alameda County, were among the findings made by the County Board of Supervisors in adopting the Ordinance. Ordinance, subd. (A); Pet. App. 94.

The Ordinance contains a few exceptions, including for persons such as peace officers, concealed carry permit holders, persons lawfully using the County target range, and participants in film, dance, theatre productions or events when the participant uses the firearm as part of the production or event and the firearm is secured when

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[5] Gov. Code Section 23004(d) provides that a county may "[m]anage, sell, lease, or otherwise dispose of its property as the interest of its inhabitants require."

not in the actual possession of that person. Ordinance, subd. (F); Pet. App. 95-96. The foregoing exception allows firearms possession on County-owned property for events in which that possession can be readily supervised and the firearm is secured when not in the participant's actual possession. Ordinance, subd. (F)(4); Pet. App. 95-96. Some activities the Nordykes allege occur at their trade shows, such as historical reenactments and other firearms-related presentations, are consistent with this exception.[6]

The Alameda County Fair Association ("Fair Association"), a separate non-profit corporation, manages the fairgrounds, and is required to operate the fairgrounds in compliance with all federal, state and local laws. R, T1, 6, ¶ 22; R, T1, 35-37. In the past, Petitioners contracted with the Fair Association to use a part of the fairgrounds for their trade shows, generally for up to five events a year, on an event-by-event basis. R, T1, 7, ¶¶ 27-28. Petitioners then subleased spaces at their trade show events to various different types of vendors, collectors, and the like. R, T1, 8, ¶ 29. A large variety of items are offered for sale at their trade shows, including firearms. R, T1, 3, ¶ 10.

After the Ordinance was adopted, the Fair Association sent Petitioners a letter asking them to provide information as to how they intended to conduct their trade shows in compliance with the Ordinance. R, T1, 3, ¶ 33; R, T1, 36-37. *Petitioners did not respond to the letter.* They then

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[6] Petitioners cite to nothing in the record that would compel the conclusion that there are no circumstances in which this exception could be constitutionally applied. Nevertheless, they mischaracterize the exception as content-based. Pet. 30. What is plain from the record is that Petitioners are not concerned with whether certain activities that occur in conjunction with their trade show ***could*** take place at the fairgrounds consistent with the Ordinance. Instead, what they allege is that because the Ordinance will discourage their firearms vendors from participating in their trade show if it is held at the fairgrounds, it will become unprofitable for them to hold the trade show at the fairgrounds, and as a result, other activities that occur in conjunction with their trade show will also not take place. R, T1, 11, ¶ 37, T1, 17-19, ¶ 59.

filed their original complaint challenging the Ordinance and moved for injunctive relief on their First Amendment and state law preemption claims. R, T1; R, T7. Their original complaint did not plead a Second Amendment claim and they did not brief that claim in connection with their motion seeking injunctive relief.[7]

The District Court denied the motion, concluding that Petitioners had failed to demonstrate a likelihood of success on the merits of the claims pleaded. Pet. App. 46, 72. In examining their state law preemption claim, the District Court considered whether the Ordinance seeks to regulate any matter preempted by any law of general application. The District Court concluded that the Second Amendment afforded them no protection because under controlling law, the Second Amendment only constrains the federal government, not states or local governments. Pet. App. 62. The District Court further noted that while Petitioners had not alleged a Second Amendment claim, they lacked standing to assert such a claim. Pet. App. 63 (citing *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996), *cert. denied*, 519 U.S. 912, 117 S.Ct. 276 (1996)). The District Court went on to find that Petitioners had demonstrated no likelihood of success on the merits of their state law preemption claims. Pet. App. 63-72.

Additionally, the District Court found that Petitioners demonstrated no likelihood of success on the merits with respect to their First Amendment Claims:

> "In contrast to expressive conduct one would uniformly associate with the act of burning our Nation's flag or even a selective service card, possession of a firearm is not an act sufficiently communicative in and of itself to carry a plainly representative or symbolic significance. The record

[7] As noted above and below, Petitioners filed an amended complaint *after* the court entered its order denying their injunction. The amended complaint also pleaded no Second Amendment claim. Resp. App. 9, 14.

> before the court is bereft of any use of the gun that was intended, in and of itself, to convey a message. Indeed, plaintiffs rely on legal conclusions that the possession of the gun is expressive conduct. Plaintiffs' Br. at 4."
>
> Pet. App. 52.

The District Court further held that Petitioners' argument that firearms possession should be treated as protected speech "would stretch the scope of speech beyond its constitutional realm, and lacks a principled basis for distinction from the possession of any regulated commodity or object as a 'statement' regarding the propriety of such regulation." Pet. App. 53. Even assuming Petitioners could overcome the initial hurdle of establishing that possession of weapons implicates speech, the trial court concluded the public safety concerns addressed by the Ordinance on its face, without regard to suppression of speech, are "so central to the exercise of local authorities' police power that a triggering incident, such as the 1998 shooting, was not a necessary constitutional predicate to its enactment, but instead only strengthens the conclusion that such a measure furthers a substantial and important interest." Pet. App. 55, n.7.

The District Court also concluded that the Ordinance met all four elements of the test established in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) and that Petitioners' argument that the court should look beyond the face of the Ordinance because of comments by one of the members of the Board of Supervisors[8] was identical to an argument rejected by the *O'Brien* Court:

> "Here, the prohibited conduct is readily severable from the exercise of speech regarding guns. In other words, this ordinance has a distinct public

[8] These are the same alleged statements by Supervisor King that are referred to in the Petition.

> health and safety interest 'unrelated to the suppression of expression.' [quoting *O'Brien*]. [¶] The second problem with the argument is that it asks the Court to strike down the statute based on an improper legislative purpose. In *U.S. v. O'Brien*, the Court rejected the precise line of argument where, as here, the ordinance itself passes constitutional muster. See *U.S. v. O'Brien*, 391 U.S. at 383. The Court explained that the Court 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.' *Id.* The Court called this a 'fundamental principal of constitutional adjudication.' *Id.* Plaintiffs have not presented any reason to set aside such a clear rule."
>
> Pet. App. 56.

The District Court also rejected Petitioners' commercial speech challenge, finding that the Ordinance does not prohibit speech associated with the buying or selling of guns or affect any part of the actual speech associated with the offer for sale or such sale.[9] Pet. App. 60.

Petitioners then filed an interlocutory appeal in the Court of Appeals for the Ninth Circuit.[10] They did not brief or argue the Second Amendment in their opening or reply briefs in the Ninth Circuit. After briefing and argument, the Ninth Circuit certified the state law preemption claim to the California Supreme Court on its own motion, asking the question: "Does state law regulating the possession of

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[9] The District Court also concluded that even if *arguendo* the Ordinance incidentally impacts speech, it is a valid time, place or manner regulation, citing to *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559 (1981) and relying on that precedent in concluding that a fairgrounds is a different type of public forum from a public street. Pet. App. 58. In particular, the District Court noted that, as in *Heffron*, the regulation of fairgrounds poses special concerns related to crowd control. Pet. App. 58.

[10] *See* List of Parties, n.1, *supra*.

firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" Pet. App. 76.

The California Supreme Court granted certification. *See Nordyke v. King*, 27 Cal.4th 875, 118 Cal.Rptr.2d 761 (Cal. 2002). Referring back to *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746 (Cal. 2002), the companion case also before it on certification from the Ninth Circuit, the California Supreme Court noted that it had there concluded that under California Government Code Section 23004(d) a county has substantial authority to manage its property, including the most fundamental decision as to how that property will be used, and that nothing in state law governing gun shows evinces an intent to override that authority. *Nordyke v. King*, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761, 766 (Cal. 2002); Pet. App. 86.[11]

After the case was returned to the Court of Appeals for the Ninth Circuit, Petitioners filed a motion for supplemental briefing on the Second Amendment in light of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362 (2002) and the change in the United States government's position on the scope of the Second Amendment. Respondents' Appendix ("Resp. App.") 28-33. The three judge panel granted the motion, ordering the simultaneous filing of supplemental briefs by the parties on all constitutional issues. Resp. App. 62.[12]

Subsequently, the Ninth Circuit panel affirmed the District Court order denying the motion for a preliminary injunction, on all claims. *See Nordyke v. King*, 319 F.3d

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[11] Finding it immaterial to the existing litigation, the California Supreme Court declined to address Petitioners' "partial preemption" arguments. Pet. App. 88-89.

[12] Petitioners are thus not correct in stating that the panel "called for" briefing on the Second Amendment issues, suggesting that the panel did so *sua sponte*. Petition 5.

1185 (9th Cir. 2003); Pet. App. 1. Petitioners petitioned for rehearing on the First Amendment claims and rehearing en banc on the Second Amendment claim. Resp. App. 34, 39-40, 57-59. The Ninth Circuit stayed consideration of the petition while the case of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.), *cert. denied*, ___ U.S. ___, 124 S.Ct. 803 (2003) was pending before this Court. The panel later denied the petition for rehearing and two of the judges on the panel voted in favor of granting the petition for rehearing en banc and the third judge on the panel "so recommended." The petition for rehearing en banc was denied. *See Nordyke v. King*, 364 F.3d 1025 (2004); Pet. App. 22.

ARGUMENT: REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument

As shown more fully below, Petitioners cannot overcome the first obstacle to their Second Amendment claim because on the threshold issue of incorporation, the decision below by the Court of Appeals for the Ninth Circuit is consistent with this Court's prior decisions and those of the sister circuits, all acknowledging that the Second Amendment has not been incorporated against the states by the Fourteenth Amendment. Thus, the Petition fails to establish any ground under U.S. Supreme Court Rule 10 for certiorari review, much less any other compelling reason for that review.

Likewise, on Petitioners' First Amendment claims, the decision below is consistent with the holdings of this Court and those of the sister circuits. Although Petitioners did not even seek rehearing *en banc* on these claims, they urge the extraordinary relief of summary reversal here. Resp. App. 34, 57-59. Consistent with its precedents, this Court should confine review to the public safety findings on the face of the Ordinance, rather than impute improper motives to the legislators as Petitioners urge. Thus, on the First Amendment claims, the Petition also fails to establish any

basis for review, much less any reason for summary reversal. Further, as shown in Respondents' Statement of the Case, the case before the Court is not final. This Court generally does not grant certiorari in the absence of a final judgment. *Virginia Military Inst. v. United States*, 508 U.S. 946, 113 S.Ct. 2431 (1993). Petitioners fail to explain why this Court should grant certiorari here, where no issue fundamental to further conduct of the case must be addressed. *Cf. Land v. Dollar*, 330 U.S. 731, 734 n.2, 67 S.Ct. 1009 (1947).

(1) On The Threshold Question Of Incorporation Of The Second Amendment, The Decision Below Is Consistent With The Holdings Of This Court And Sister Circuit Courts, And Thus There Is No Rule 10 Ground And No Other Compelling Reason For Certiorari Review On That Threshold Issue

This Court follows its own precedents unless they are found to embody clear error, or become unworkable or doctrinally outmoded. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 2808 (1992). Before addressing Petitioners' belatedly raised Second Amendment claim, this Court must first determine whether it should reverse its decisions holding that the Second Amendment constrains only federal action. *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875); *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580 (1886); *see also* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW 332-334 (4th ed. 1991) (explaining that this Court has rejected "total incorporation" and that the entire Bill of Rights has not been incorporated). As discussed more fully below, there has been no evolution of legal principle or development of constitutional law that would make obsolete these precedents. *See Casey, supra,* 505 U.S. at 857.

Incorporation is the *threshold issue* raised by Petitioners' Second Amendment claim: Whether they have standing to raise a Second Amendment claim, and what right is protected by the Amendment are questions that

need not be answered *unless and until* the Court first finds that the Second Amendment protects against infringement by the *state*. That is, even if this Court were to determine that the Second Amendment protects an individual right to possess firearms, as Petitioners urge, the Court would still need to resolve whether, under the Fourteenth Amendment Due Process Clause, individual possession of hand-held weapons (e.g. "arms")[13] implicates a right so rooted in the traditions and conscience of the American people as to be ranked "fundamental." *See Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 2268 (1997) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934)). Assuming *arguendo* the Second Amendment protects an individual right, it is by no means evident that such a right is a fundamental right "implied in the concept of ordered liberty." *Id.* For example, while forty-two (42) states have state constitutional provisions that explicitly recognize an individual right to bear arms distinct from militia-related activity, or the state courts have interpreted the right in this manner, in only three (3) of those states have the courts held that the right is fundamental (Ohio, Montana and Wisconsin).[14] Resp. App. 98-100; *see also* state by state analysis of state right to bear arms provisions and relevant law set forth at http://www.firearmslawcenter.org.

This Court's decisions addressing challenges to federal weapons laws also indicate that this Court does not consider weapons regulation to "trench upon any constitutionally protected liberties." *See Lewis v. United States*, 445 U.S. 55, 65 n.8, 100 S.Ct. 915, 921 n.8 (1980) (rejecting a constitutional challenge to a felon in possession law, citing

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[13] "Arms" is defined as "anything that a man wears for his defense, or takes in his hands as a weapon." DELUXE BLACK'S LAW DICTIONARY 109 (6th ed. 1990).

[14] Even in those three states, the courts use a "reasonableness test" in such challenges. In Alaska and New Hampshire, the courts require a substantial interest/narrow means test.

Miller, *infra*, and stating that legislative firearms restrictions "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."). *See also Burton v. Sills*, 394 U.S. 812, 89 S.Ct. 1486 (1969) (dismissing an appeal for "want of a substantial federal question" where a state court held that the Second Amendment does not confer a right to bear arms unrelated to militia service). This Court has never found any federal firearms or other weapons regulation to implicate a fundamental right and has reviewed various federal firearms regulations without addressing the Second Amendment. *See United States v. Bean*, 537 U.S. 71, 123 S.Ct. 584 (2002); *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

For this Court to adjudicate the question of Second Amendment "incorporation" on this record would also violate the Court's tenet against deciding any constitutional question except with reference to the particular facts to which it is to be applied or prematurely. *See Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S.Ct. 1636, 1642 (1997) (quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389-1390 (1945)). As noted above, the complaint pleads no Second Amendment violation. On the facts pleaded below, both the trial court and the Ninth Circuit upheld the Ordinance against the First Amendment challenges. Nothing in the Petition or the opinions below explains how or why the Second Amendment, if held incorporated, would preclude such a reasonable exercise of the local police power.

At most, what the Petition and the opinions below do present, *in the abstract*, is one side of an ongoing debate regarding the nature of the right protected by the Second Amendment. As discussed more fully below, that debate reflects no new consensus from which this Court could divine an evolution of legal principle rendering its earlier decisions regarding incorporation of the Second Amendment

or the scope of the Second Amendment "obsolete." *See Casey, supra,* 505 U.S. at 857.[15]

(2) Even If It Were "Incorporated," The Second Amendment Protects Only Conduct That Bears Some Reasonable Relationship To The Well Regulated Militia; And Petitioners Fail To Show That The Ordinance Infringes Such Protected Activity

Even if this Court's incorporation doctrine did not bar Petitioners' Second Amendment claim, Petitioners have failed to demonstrate that they stand in a position to show legal injury in connection with that claim. Although this Court's Second Amendment jurisprudence has not been extensive, it has been consistent. This Court has never recognized an unqualified, individual right under the Second Amendment to possess hand-held weapons generally or firearms specifically, and has linked the right protected by the Second Amendment to the "preservation or efficiency of a well regulated militia." *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816 (1939); *see also Lewis v. U. S.*, *supra*, 445 U.S. at 65 n.8; *see also Burton, supra,* 394 U.S. 812 discussed above. Moreover, as noted above, the Court has reviewed individual challenges to federal firearms laws without addressing the Second Amendment at all.

The federal circuits that have addressed the scope of Second Amendment have implemented the *Miller* holding in various ways. All except the Fifth Circuit characterize the right protected by the Amendment as collective in

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[15] Given this lack of analysis of the Second Amendment claim as applied to the facts of this case, Petitioners' statement that "[e]very one of the Ninth Circuit judges who authored an opinion in this case on the Second Amendment, have [sic] suggested that Petitioners should have won[,]" is humorous and wrong. Pet. 8. At most, these judges suggested they agree with Petitioners' view of the Second Amendment. However, this is a lawsuit, not a debate.

nature or encompassing only those activities reasonably related to the preservation or efficiency of a well regulated militia. *See Silveira*, *supra*, 312 F.3d at 1063 n.10 (summarizing the relevant circuit decisions). In the Ninth Circuit, the court has developed an Article III "standing" rule. *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). This "standing" rule is consistent with the *Miller* holding (albeit an evolution out of that holding), and the relevant holdings of the other circuit courts, except the Fifth Circuit, because the "standing" rule requires that the Second Amendment be asserted in connection with the preservation or efficiency of the well regulated state militia. *Hickman*, 81 F.3d at 102-103.

In contrast, Petitioners' reading of *Miller* ignores the foregoing aspect of *Miller* and the procedural context of the case. In *Miller*, a federal indictment issued against two individuals accused of transporting a shotgun with a shortened barrel from Oklahoma into Arkansas without registering the weapon in violation of the National Firearms Act. They successfully demurred to the indictment on the ground that the Act violated their "right to keep and bear Arms" under the Second Amendment. The indictment was quashed, and judgment entered against the federal government. *Miller*, 307 U.S. at 175-176.

The United States then appealed directly to the Supreme Court, seeking to have the indictment reinstated. The defendants made no appearance in the appeal. *Id.* at 175. Thus, other than the firearm itself, the Court had nothing before it to consider on the issue of whether defendants possessed that weapon for purposes having some reasonable relationship to the preservation or efficiency of the well regulated militia.[16] What is very clear from the opinion is that the Court considered

[16] Therefore, there is nothing in the case or the lower court decision from which Petitioners could derive a conclusion regarding what claims the defendants made or did not make regarding the militia.

evidence of such a relationship essential to a claim under the Second Amendment:

> "The Constitution as originally adopted granted to the Congress power – 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S.C.A. Const. art 1, s 8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."
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> *Miller*, 307 U.S. at 178.

Without anything evidentiary before the Court – *except the weapon* – the Court concluded it could not infer anything regarding the requisite relationship to that "obvious purpose" from the firearm alone: "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 177.

It is one thing for a reviewing court to avoid unnecessary adjudication of a constitutional issue, especially in the total absence of the parties raising it below, and to dispose of the matter by concluding that even if the claimed right exists, it does not protect the conduct at issue, as the Court did here. It is another thing entirely for the reviewing court to accept the right claimed. Thus, the *Miller* Court did not characterize the right protected by the Second Amendment as either individual or collective. However, what *Miller* establishes about the Second Amendment is stated exactly by the Court, as quoted above. Because Petitioners ignore this admonition as to

how the Second Amendment is to be interpreted and applied, Petitioners unsuccessfully reduce *Miller* to the rule Petitioners would like to posit, e.g., that the Second Amendment guarantees possession by individuals of military-type weapons.[17] Pet. 20.

As shown above, the Ninth Circuit "standing" rule is consistent with the militia-based interpretation of the Second Amendment enunciated by this Court in *Miller*. Contrary to the claims of Petitioners and the dissenting opinions below, there has been no "development of constitutional law" or consensus on the Second Amendment that would make the Ninth Circuit's implementation of *Miller* erroneous.

Granted there have been a number of articles, principally in law school law journals (which are not peer-reviewed) promoting an individual rights, non-militia based interpretation of the Second Amendment. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 8-10 (2000).[18] In turn, these articles have been criticized in other scholarly articles. *See id.* Some of the most severe critics have been historians, who take issue with how the "individual rights" authors read (or fail to read) aspects of

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[17] Ironically, Petitioners' strained interpretation of *Miller* directly contradicts Petitioners' and the dissenting judges' view that Petitioners' Second Amendment individual rights claim is a better claim for this Court to review on writ of certiorari than was that of the *Silveira* petitioners, who sought review of the Ninth Circuit's decision upholding California's *assault weapon* ban against a Second Amendment individual rights challenge. Pet. 8, 9. Certainly it is hard to imagine a better case than *Silveira* for judicial review under the Second Amendment of the alleged individual Second Amendment right to possess military-style weapons that Petitioners derive from *Miller*.

[18] Notably there are more articles than authors because a number of the authors have contributed multiple articles supporting the "individual rights" view. *See* Matthew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 771 (2002).

the relevant historical record.[19] Even Sanford Levinson, whose article "*The Embarrassing Second Amendment*," 99 YALE L.J. 637 (1989) is credited with inaugurating the

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[19] For example, historian Don Higginbotham explores the failure of the recent scholarship to examine the state militias as an institution: "Virtually absent from these gun ownership and gun rights arguments, in both the legal and the historical literature, is what Americans had to say about control of the state militias before, during, and after the writing of the Constitution. The subject is important because it shows how radical was the shift from the states' total control of their militias to the sharing of the authority under the Constitution, how disturbing this development was to the Antifederalists, how James Madison dealt with Antifederalist concerns in the Second Amendment and, finally, how the issue was resolved in the first half of the nineteenth century." Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM & Mary Q. 39, 40 (1998) at Resp. App. 62. *See also* Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENTARY 269, 272-273 (1999). Shalhope questions the "insurrectionist" theory of the Second Amendment, noting that the individuals who mounted early insurrections such as the Whiskey Rebellion "clearly believed the militia to be literally the entire body of the people in arms" rising up against what they perceived as government tyranny, "[b]ut those who had been involved in writing both the Constitution and the Bill of Rights – Antifederalists as well as Federalists – united in opposition to such uprisings. These people distinguished between the orderly use of extra-legal action during the Revolution – when the people had no legal recourse to challenge the unjust acts of Parliament – and the insurrections in western Pennsylvania. *All agreed that individuals could not spontaneously constitute themselves as militia units outside the control of the state or assert an individual right to bear arms to check government tyranny.*" Similarly, in the context of the "individual rights" theorists' reliance on the right to bear arms provisions of the original Pennsylvania Constitution, historian Saul Cornell points out that the Pennsylvania Test Acts, enacted shortly after that Constitution, imposed penalties on citizens who refused to take a state loyalty oath, including stripping them of their right to vote, to sit on juries, *and disarming them*. Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 670-72 (2002). Cornell notes that "[a]lthough a number of legal scholars have been won over to the individual rights view, most early American historians reject that view." *Id.* at 661.

spate of recent "individual rights" articles, concedes that the claim that this scholarship represents the "standard" view of the Amendment is unwise. *See* Sanford Levinson, THE HISTORIANS' COUNTERATTACK: SOME REFLECTIONS ON THE HISTORIOGRAPHY OF THE SECOND AMENDMENT, GUNS, CRIME AND PUNISHMENT IN AMERICA 93 (Harcourt ed. 2003).

Many prominent scholars have endorsed a militia-based view of the right protected by the Second Amendment. *See, e.g.*, Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000); Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); Garry Wills, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 376 n.318 (1998); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984). *See also Silveira, supra*, 312 F.3d at 1065-66, 1070 (citing some of the foregoing articles as well as other texts and articles supporting a collective-rights based interpretation of the Amendment).

Petitioners and the dissenting opinions below point to the Fifth Circuit's opinion in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362 (2002), as articulating the "individual rights" view of the Second Amendment on which scholarly consensus has *allegedly* been reached. However, historian Cornell points out that the Fifth Circuit made little use of even the relevant academic law review literature, quoting extensively instead from a text supplied to the court by the Second Amendment Foundation, entitled *The Origin of the*

Second Amendment. Cornell states that the numerous errors he found when checking the references cited in that text suggest that the *Emerson* court erred in treating it as an authoritative scholarly text. *See* Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 677 (2002).

Likewise, since the *Emerson* case was handed down, no other federal circuit court has reinterpreted the Second Amendment as protecting a personal, individual right. Accordingly, there is also no development of *constitutional law* that would even place in question the Ninth Circuit's "standing" rule.[20]

(3) Under Any Interpretation Of The Second Amendment, Petitioners Have Established No Standing To Assert That Right

Assuming *arguendo* a non-militia based, extreme individual-rights interpretation of the Second Amendment, neither Petitioners, nor the dissenting opinions below explain why Petitioners, as trade show operators, have standing to raise that claim on their own behalf. Further,

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[20] That Congress has made a statement defining the scope of the Second Amendment when enacting legislation (Pet. 15, 16) and that the U.S. Attorney General and Solicitor General now interpret the Second Amendment in a manner at odds with the interpretation of every federal circuit addressing that issue since *Miller* except the Fifth Circuit, are interesting facts but only from the point of view of separation of powers. This Court continues to make clear that under the U.S. Constitution it is the judicial branch that determines what the law is, not the executive or legislative branch. *See Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803); *see also J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130-131, 122 S.Ct. 593 (2001) (determining that newly developed plant breeds are patentable, and citing to *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 2211 (1980) ("It is of course correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken 'it is the province and duty of the judicial department to say what the law is.'")).

to the extent that Petitioners seek to assert the alleged individual, Second Amendment rights of their gun vendors and some trade show attendees,[21] they establish no legal basis for third-party standing. *See Elk Grove Unified School District v. Newdow*, ___ U.S. ___, 124 S.Ct. 2301, 2309 (2004) (explaining that this Court's standing jurisprudence contains Article III standing and prudential standing; that prudential standing encompasses the rule barring a litigant from raising another's legal rights, and barring adjudication of generalized grievances more appropriately addressed by the representative branches).[22] What is clear is that the Petition and the dissenting opinions nowhere explain how any interpretation of the Second Amendment compels the County to regulate its property so that Petitioners may continue to hold their trade shows there profitably, or how Petitioners have standing under that Amendment to sue the County if it does not so regulate its property.

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[21] Respondents do not concede that these individuals have standing to raise such claims either. *See* Section (2), above.

[22] Moreover, while Judge Gould's opinion characterizes the Ordinance as having "the effect of foreclosing a traditional gun show" (Pet. App. 26), it is unclear what he understands that term to mean or what he believes it signifies here. The Code of Federal Regulations, Title 27, Chapter 1, Subchapter M, Part 178, Section 178.100(b)(1)(B) defines a gun show as "a function sponsored by any national, state or local organization, devoted to the collection, competitive use, or other sporting use of firearms or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms." California state law incorporates this definition. *See* Cal. Penal Code § 12071(b)(1)(B) (stating, in pertinent part: "[a] person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events, as defined in section 178.100 of Title 27 of the Code of Federal Regulations, or its successor, if the gun show or event is not conducted from any motorized or towed vehicle. . . . ").

(4) Even If Petitioners Could Establish Standing To Assert An Individual Right To Bear Arms, Under Any Interpretation Of The Second Amendment The Challenged Ordinance Is Reasonable And Thus Constitutional

Even if Petitioners overcame the hurdles of incorporation and standing, it is not necessary for this Court to examine the merits of their individual rights claim. Under any interpretation of the Second Amendment, the Ordinance is a reasonable regulation, narrowly drawn to further a substantial purpose, and thus it would not violate the Amendment. *See, e.g., Emerson, supra,* 270 F.3d 203, 261 (acknowledging that the right protected by the Second Amendment is subject to reasonable restrictions); *see also* Resp. App. 98-100 (illustrating that in the forty-two (42) states where the state constitution contains a provision protecting an *individual* "right to keep and bear arms," the state courts in forty (40) of these states use a "reasonableness" test in challenges to firearms laws under the constitutional provisions).

Neither the Petition nor any of the dissents proposes how an individual-rights interpretation of the Second Amendment would place in question the legislative action challenged. In fact, courts have found constitutional local firearms laws that are far more restrictive than the Ordinance, when those laws were challenged under state constitutional provisions *expressly* protecting an individual right to possess arms. *See, e.g., Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied,* 464 U.S. 863, 104 S.Ct. 194 (1983) (upholding village-wide ban on handgun possession against challenge based on state constitutional right to bear arms); *see also Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993) (upholding city-wide ban on possession and sale of assault weapons against state constitutional right to bear arms challenge).

(5) Petitioners' *Failure* To Convince The Trial Court Or The Three-Judge Ninth Circuit Panel That The Ordinance Implicates The First Amendment Does Not Support Summary Reversal.

As noted above, Petitioners did not believe their First Amendment claim was strong enough to seek rehearing en banc on that claim. Resp. App. 34, 39-40, 57-59. Yet here they seek the extraordinary remedy of summary reversal. However, as shown below, the Ordinance regulates conduct, not speech. Even assuming *arguendo* an incidental impact on speech, the Ordinance is a valid time, place or manner restriction because it is narrowly drawn, serves a substantial interest not connected to the suppression of speech and leaves open ample alternative forums. Pet. App. 57-58. Summary reversal on this claim is therefore not appropriate.

The threshold inquiry in every First Amendment claim is whether the challenged government action involves speech or expression. *Texas v. Johnson,* 491 U.S. 397, 403-404, 109 S.Ct. 2533, 2538-2539 (1989). Conduct does not possess sufficient communicative elements to bring the First Amendment into play unless an intent to convey a message is present and "the likelihood [is] great that the message would be understood by those who viewed it." *Id.* at 404. As the District Court concluded, Petitioners do not and cannot meet this burden. *Mere possession* of guns on County-owned property conveys no clear message to anyone. Pet. App. 52-55. Petitioners admit that persons possess guns at their trade show for a host of reasons, to sell, to use as props, because the particular firearm has some alleged military or historical importance, as a political statement, etc. R, T1, 3, ¶ 10; 9-10, ¶ 36.

This Court has consistently rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien,* 391 U.S. at 376. Moreover, the only cases in which this Court has

invalidated laws regulating *expressive* conduct are those in which it has concluded that the government has prohibited that conduct "*precisely because of its communicative attributes*." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 2466 (1991) (Scalia, J. concurring) (citing *Texas, supra, Spence, supra,* among other cases) (emphasis in original).

As the District Court recognized, the County passed the Ordinance in the *interests of the public health and safety*. Pet. App. 54-55. The stated public safety reasons are unrelated to any alleged communicative aspects of gun possession. Pet. App. 56. Even assuming *arguendo* an incidental restriction on First Amendment freedom of speech or association rights resulting from the Ordinance, such restriction is no greater than essential for furtherance of this governmental interest. Accordingly, the Ordinance meets the test established in *O'Brien*. *See* 391 U.S. at 369.

Moreover, a facial First Amendment claim such as Petitioners' fails unless the challenged law is directed narrowly and specifically at expression or conduct commonly associated with expression. *See Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760, 108 S.Ct. 2138 (1988). Firearms possession, to which the Ordinance is directed, fits into neither category. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2917-2918 (1973) (examining a facial overbreadth challenge to a law regulating conduct and stating "[a]lthough such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.").

Petitioners' effort to claim First Amendment protection because some vendors display inscribed firearms and antique firearms also fails. *See One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012-1015, 1012 n.4 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009,

117 S.Ct. 554 (1996). Like the Ordinance in *One World,* the challenged Ordinance meets the test for a valid time, place or manner restriction, as described above and as the District Court found, even if *arguendo* the presence of inscribed or embellished items at trade shows implicates the First Amendment. R, T15, 9-10. Petitioners' challenge is governed by *One World* except that the Ordinance is challenged with respect to the fairgrounds, a *limited public forum*, while the ordinance in *One World* involved the sidewalks, a traditional public forum. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559 (1981). Even in a *traditional public forum*, however, where a regulation does not exclude speakers from that forum based on speech content, the appropriate standard is the standard governing time, place or manner restrictions – the same standard that applies *to a limited public forum*. *See One World*, 76 F.3d 1009, 1012.

Like the ordinance in *One World,* the challenged Ordinance also leaves open ample alternate channels of communication. *None of the speech or associational activities that the Nordykes allege occur at their trade shows are prohibited by the Ordinance.* Thus, the Fairgrounds remains a forum for those activities. In addition, there are ample places where trade shows may be held that are not governed by the Ordinance.[23]

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[23] According to the estimates of the National Association of Arms Shows, every weekend in this country there are more than 100 shows where firearms are available for sale and purchase (i.e., more than 5000 a year). *See* Tom Diaz, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 49 (1999) (citing *"Gun Show Dealers Spread Thin," Firearms Business*, Nov. 15, 1995, at 4). This proliferation of gun sale-type shows results directly from provisions of the 1986 Firearms Owners' Protection Act (aka McClure-Volkmer) which liberalized the restrictions on licensed dealer sales, enabling licensed dealers to sell firearms away from their licensed premises if at a "gun show or event" held in the same state. Diaz, *supra* at 49 (citing a letter submitted to hearings of

(Continued on following page)

While it is unclear whether Petitioners also seek summary reversal of their commercial speech claim, neither reversal nor review of that claim is warranted because as the courts below readily concluded, the Ordinance infringes no commercial speech rights. It is established law that the buying and selling of guns is commercial activity, not speech and that such activity *per se* is not afforded First Amendment protection. *See Nordyke v. Santa Clara County,* 110 F. 3d 707, 710 (9th Cir. 1997) ("*Nordyke I*") ("We agree that the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment.").

Unlike the ordinance in *Nordyke I,* the challenged Ordinance does *not* prohibit offers for sale and/or an invitation for an offer to purchase. It also does *not* prohibit speech aimed at soliciting, offering or engaging in sales of guns. All of those activities are *permitted* under the Ordinance. The *only* thing prohibited by the Ordinance is *actual possession* of firearms on County-owned property. Moreover, this prohibition is effected by the *Ordinance*, not by a lease addendum or contract.

Petitioners complain that the Ordinance prohibits display of the firearms by persons who wish to display them. However, as *Nordyke I* demonstrates, if possession of firearms is prohibited by law, display for whatever purpose is no longer a lawful activity and need not be protected. A person's desire to display an item does not create a First Amendment right to display that item in a location where a content-neutral law prohibits its possession.

Finally, the Ordinance is also well within the constitutional scope of government regulation of activities on the fairgrounds under the "public forum doctrine." As noted above, the fairgrounds is, *at most*, a limited public forum. *See Heffron, supra*, 452 U.S. at 656 (1981) (state fairgrounds in use for a *state fair* was a *limited* public forum).

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the U.S. House Subcommittee on Crime and Criminal Justice by an executive director of the National Alliance of Stocking Gun Dealers).

Even if the fairgrounds were a traditional public forum – and it is *not* – the challenged Ordinance, like the ordinance in *One World*, does not discriminate against any class of speakers based on content of their speech. R, T13, 10-11; *One World*, 76 F.3d 1009, 1012. Accordingly, the challenged Ordinance meets the test for a valid time, place or manner restrictions.

This Court's precedents also prohibit Petitioners from bringing their claims within the ambit of the First Amendment by urging this Court to second-guess the motives of the legislators in adopting the Ordinance. Reduced to its essence, this attempt to force the Court behind the legislative findings on the face of the Ordinance comprises Petitioners' entire argument for summary reversal on the First Amendment claims.[24] Judicial probing into legislative motives is barred by the doctrine of *separation of powers,* as recognized in the "deliberative process privilege." *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941).

The courts have consistently reaffirmed this prohibition on second-guessing the motives of legislators. R, T15, 8-9. *See, e.g., City of Las Vegas v. Foley*, 747 F.2d 1294, 1297-1298 (9th Cir. 1984) (citing *Hing v. Crowley,* 113 U.S. 703, 710-11, 5 S.Ct. 730 (1885) ("Individual legislators may vote for a particular statute for a variety of reasons. 'The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.'")). Moreover, as the District Court specifically found and as is shown here, the Ordinance itself passes constitutional muster. This Court will not strike down an

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[24] Petitioners improperly characterize Supervisor King's statements in a memo and a press release before the Ordinance was given a first reading and statements they allege she made at a press conference as the "legislative history." Moreover, as shown here, judicial review is confined to the face of the Ordinance.

otherwise constitutional statute on the basis of an *alleged* illicit legislative motive. *O'Brien*, 391 U.S. at 383.

Petitioners string together statements from various First Amendment cases, taken out of context, and attempt to cobble together a rule that any regulation that "affects" First Amendment interests must be narrowly drawn to effectuate a compelling state interest. Pet. 27. However, this rule is unsupported by this Court's decisions, *including those cited* by Petitioners. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 103 S.Ct. 948 (1983) involves a challenge to a provision in a collective bargaining agreement giving one union's bargaining representative exclusive access to teachers' mailboxes. The Court found that the mailboxes were not traditional or limited public forums and upheld the provision as reasonable. In deciding the issue, the Court summarized the rule that in a public forum, a state may enforce content-neutral regulations of time, place or manner provided they serve a significant government interest and are narrowly drawn. In the context of *content-based* regulations, the Court noted that such a regulation must be necessary to serve a compelling state interest, and must be narrowly related to that interest. The case does not establish that the compelling state interest rule applies where the regulation at issue is content-neutral, as here. The case is consistent with the cases cited by Respondents.

In *Meyer v. Grant*, 486 U.S. 414, 427, 108 S.Ct. 1886 (1988) the Court invalidated a state law prohibiting paid circulars for initiative petitions, finding that presenting written viewpoints about such petitions was "core political speech," and the prohibition on paid circulars had the effect of limiting that speech. Similarly, *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568 (1987) invalidated a Board resolution banning "First Amendment activities" at Los Angeles International Airport. The Court found that the resolution prohibited all expressive activity and did not seek to regulate merely

expressive activity that might create problems such as congestion. Here the Ordinance regulates conduct, not speech, and furthers a substantial public interest without regard to speech content. Further, as shown above, even assuming *arguendo* an incidental impact on speech, the Ordinance is a valid time, place or manner regulation, as defined in *Perry*.

Similarly, Petitioners cite *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569, 115 S.Ct. 2338 (1995) for the proposition that display of guns should be protected. In *Hurley,* the Court struck down a state court order requiring a private group that was planning a parade to include the Irish-American Gay, Lesbian and Bisexual Group in the parade. In discussing parades, the Court noted that "The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Id.* Petitioners fail to show how this observation undermines this Court's cases regarding content-neutral regulation cited by Respondents above. Likewise, in *Edwards v. Goldsboro,* 178 F.3d 231 (4th Cir. 1999), a police officer was suspended for teaching a course in handgun safety, off duty, at a location unrelated to the City, after he was previously denied permission to do so by the police chief. He sued under Section 1983 and his claims were dismissed after his motion for leave to amend was denied. The Fourth Circuit reinstated several of his claims, including his First Amendment claims, finding his teaching of the safety course to be protected by the First Amendment. Petitioners fail to show how this holding precludes a content-neutral, time, place or manner prohibition of firearms on certain county-owned property that leaves open ample alternative forums for handgun-safety courses.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for certiorari and Petitioners' request for summary reversal be denied.

Respectfully submitted,

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Counsel of Record
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A Professional Corporation

Attorneys for Respondents Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors

RICHARD WINNIE
County Counsel
County of Alameda

California Statutes

Cal.Health & Safety Code § 34240.

Housing authority of county or city; transaction of business; resolution of governing body

In each county and city there is a public body corporate and politic known as the housing authority of the county or city. The authority shall not transact any business or exercise its powers unless, by resolution, the governing body of the county or city declares that there is need for an authority to function in it.

West's Ann.Cal.Health & Safety Code § 34240

Cal. Health & Safety Code § 34201.

Legislative findings and declaration of policy

It is hereby declared:

(a) That there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions of this chapter is declared as a matter of legislative determination.

West's Ann.Cal.Health & Safety Code § 34201

Cal. Health & Safety Code § 34400.

Property and bonds of housing authority exempted from taxation

It has been found and declared in the Housing Authorities Law [Section 34200] and the Housing Cooperation Law [Section 34500 *et seq.*] (a) that there exist in the State housing conditions which constitute a menace to the health, safety, morals and welfare of the residents of the State; (b) that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire

and accident prevention, and other public services and facilities; (c) that the public interest requires the remedying of these conditions by the creation of housing authorities to undertake projects for slum clearance and for providing safe and sanitary dwelling accommodations for persons who lack sufficient income to enable them to live in decent, safe and sanitary dwellings without overcrowding; and (d) that such housing projects are for public uses and purposes and are governmental functions of state concern. As a matter of legislative determination, it is hereby found and declared that the property and bonds of a housing authority are of such character as shall be exempt from taxation.

West's Ann.Cal.Health & Safety Code § 34400

Cal. Health & Safety Code § 34315.

Acquisition and disposition of property; insurance; loans

An authority may:

(a) Lease or rent any dwellings, houses, accommodations, lands, buildings, structures, or facilities embraced in any housing project, or a project assisted pursuant to Section 34312.3, and establish and revise the rents or charges for them.

(b) Own, hold, and improve real or personal property.

(c) Purchase, lease, obtain option upon, acquire by gift, grant, bequest, devise,or otherwise, any real or personal property or any interest in property.

(d) Acquire any real property by eminent domain.

(e) Sell, lease, exchange, transfer, assign, pledge, or dispose of any real or personal property or any interest in it.

(f) Insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards.

(g) Lend upon the security of a mortgage or deed of trust, directly or by purchase from one or more qualified mortgage lenders, in connection with the sale of real property to persons of low income and to other persons pursuant to Section 34312.3, moneys for the financing of construction or rehabilitation pursuant to this part, or the implementation of government housing and rehabilitation financing programs for persons of low income and for other persons when acting pursuant to authorization contained in Section 34312.3, Part 13 (commencing with Section 37910) of this division, or Part 3 (commencing with Section 50900) of Division 31, subject only to the limitations on income of borrowers or residents prescribed by the statutory provisions under which the authority is acting. With respect to financing activities conducted pursuant to Part 3 (commencing with Section 50900) or Part 4 (commencing with Section 51600) of Division 31, the authority shall obtain certification as a qualified mortgage lender pursuant to Section 50094.

(h) Procure insurance or guarantees from the federal government or the California Housing Finance Agency or from any person licensed to insure mortgages in this state of the payment of all or part of any debts, whether or not incurred by the authority, secured by mortgages or deeds of trust on any property included in any of its housing projects or otherwise financed pursuant to this chapter or

secured by mortgages or deeds of trust pursuant to Part 13 (commencing with Section 37910) of this division or Part 3 (commencing with Section 50900) of Division 31.

West's Ann.Cal.Health & Safety Code § 34315

Cal. Penal Code § 171b.

Unauthorized possession of weapons in state or local public building or at public meeting; offense; punishment

(a) Any person who brings or possesses within any state or local public building or at any meeting required to be open to the public pursuant to Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of, or Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, any of the following is guilty of a public offense punishable by imprisonment in a county jail for not more than one year, or in the state prison:

(1) Any firearm.

(2) Any deadly weapon described in Section 653k or 12020.

(3) Any knife with a blade length in excess of four inches, the blade of which is fixed or is capable of being fixed in an unguarded position by the use of one or two hands.

(4) Any unauthorized tear gas weapon.

(5) Any taser or stun gun, as defined in Section 244.5.

(6) Any instrument that expels a metallic projectile, such as a BB or pellet, through the force of air pressure, CO_2

pressure, or spring action, or any spot marker gun or paint gun.

(b) Subdivision (a) shall not apply to, or affect, any of the following:

(1) A person who possesses weapons in, or transports weapons into, a court of law to be used as evidence.

(2)(A) A duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a retired peace officer with authorization to carry concealed weapons as described in subdivision (a) of Section 12027, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, or any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer.

(B) Notwithstanding subparagraph (A), subdivision (a) shall apply to any person who brings or possesses any weapon specified therein within any courtroom if he or she is a party to an action pending before the court.

(3) A person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(4) A person who has permission to possess that weapon granted in writing by a duly authorized official who is in charge of the security of the state or local government building.

(5) A person who lawfully resides in, lawfully owns, or is in lawful possession of, that building with respect to those

portions of the building that are not owned or leased by the state or local government.

(6) A person licensed or registered in accordance with, and acting within the course and scope of, Chapter 11.5 (commencing with Section 7512) or Chapter 11.6 (commencing with Section 7590) of Division 3 of the Business and Professions Code who has been hired by the owner or manager of the building if the person has permission pursuant to paragraph (5).

(7)(A) A person who, for the purpose of sale or trade, brings any weapon that may otherwise be lawfully transferred, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(B) A person who, for purposes of an authorized public exhibition, brings any weapon that may otherwise be lawfully possessed, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(c) As used in this section, "state or local public building" means a building that meets all of the following criteria:

(1) It is a building or part of a building owned or leased by the state or local government, if state or local public employees are regularly present for the purposes of performing their official duties. A state or local public building includes, but is not limited to, a building that contains a courtroom.

(2) It is not a building or facility, or a part thereof, that is referred to in Section 171c, 171d, 626.9, 626.95, or 626.10 of this code, or in Section 18544 of the Elections Code.

(3) It is a building not regularly used, and not intended to be used, by state or local employees as a place of residence.

West's Ann.Cal.Penal Code § 171b

9th Circuit No. 99-17551 [DC# 99-4398-MJJ]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

RUSSELL ALLEN NORDYKE and SALLIE ANN NORDYKE, dba TS TRADE SHOWS, JESS B. GUY, DUANE DARR, WILLIAM J. JONES, DARYL N. DAVIS, TASIANA WERTYSCHYN, JEAN LEE, TODD BALTES, DENNIS BLAIR, R.L. (Bob) ADAMS, ROGER BAKER, MIKE FOURNIER and VIRGIL McVICKER,

Plaintiffs-Appellants,

vs.

MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, SCOTT HAGGERTY, THE COUNTY OF ALAMEDA, and THE COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MOTION TO STRIKE PORTIONS OF APPELLANTS' EXCERPTS OF RECORD AND REFERENCES IN APPELLANTS' OPENING BRIEF TO SUCH PORTIONS

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MOTION TO STRIKE PORTIONS OF APPELLANTS' EXCERPTS OF RECORD AND REFERENCES IN APPELLANTS' OPENING BRIEF TO SUCH PORTIONS

Pursuant to Rules 27 and 10 of the Federal Rules of Appellate Procedure (F.R.A.P.), Circuit Rule 27, and *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074 (9th Cir. 1988), Defendants-Appellees Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors ("County") move this Court to strike portions of Appellants' Excerpts of Record, namely Appellant's Amended Verified Complaint ("Amended Complaint") [Exhibit "C"] and any references in Appellant's Opening Brief to the Amended Complaint on the ground that Appellants have improperly included the Amended Complaint in the Excerpts of Record.

On September 17, 1999 Appellants filed an initial complaint naming Alameda County, the Alameda County Board of Supervisors as a body, and naming each of the individual board members, and challenging the Ordinance on First and Fourteenth Amendment grounds, and seeking

damages and injunctive relief and a declaration based upon a state preemption claim. [Exhibit "A" Docket No. 1] On September 30, 1999, Appellants moved the District Court for a temporary restraining order to enjoin the application of the Ordinance. [Exhibit "A" Docket No. 12] On or about September 28, 1999, the County filed an opposition to the Appellant's motion for a temporary restraining order. [Exhibit "A" Docket No. 29]

On October 28, 1999, the District Court heard arguments on Appellant's motion for a temporary restraining order. On November 3, 1999, the District Court issued its order denying the Appellants' motion for injunctive relief. [Exhibit "B"]

On October 7, 1999, the County filed a motion to dismiss the original complaint. [Exhibit "A" Docket No. 45] Appellants did not file a response to the motion to dismiss, but instead on November 10, 1999, and *after* the District Court's November 3, 1999 denial of Appellants' motion for a temporary restraining order and preliminary injunction, the Nordykes filed an Amended Verified Complaint, adding 12 individual plaintiffs, some allegations and exhibits and switching the order of the fourth and fifth claims. [Exhibit "C"]

As shown more fully below, Appellants improperly rely on their Amended Complaint to support their appeal from the District Court's order denying their motion for injunctive relief. Under F.R.A.P. Rule 10(a), the Record on Appeal consists of the following material:

> "Composition of the Record on Appeal. The following items constitute the record on appeal:
>
> (1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any, and

(3) a certified copy of the docket entries prepared by the district clerk."

Here, Appellants filed the Amended Complaint with the District Court *after* the District Court issued its order denying the Appellants' motion for a temporary restraining order and preliminary injunction. The Court in *Kirshner v. Uniden Corp. of America*, 842, F.2d 1074, 1077 (9th Cir. 1988) held that *"[p]apers submitted to the district court after the ruling that is challenged on appeal should be stricken from the record on appeal." Id.* at 1077-1078 (emphasis added) [quoting *United States v. Walker*, 601 F.2d 1051, 1054-1055 (9th Cir. 1979) (" 'We are here concerned only with the record before the trial judge *when his decision was made.*' ") (italics in case); citing *Heath v. Helmick*, 173 F.2d 156, 156-157 (9th Cir. 1949) ("striking from record on appeal papers that were filed in district court after judgment from which appeal was taken) ("The cause must be tried here upon the record made at the original trial.")]

In *Kirshner*, the contested portions of the Excerpts of Record were served on the court one month after the hearing on the motion and one week after entry of the protective order. *See id.* at 1078. Here, Appellants filed the Amended complaint on November 10, 1999 – twelve days *after* the hearing on the motion for a temporary restraining order and preliminary injunction and *seven days after the District Court issued its order* denying Appellants' motion. Because the Amended Complaint was *not* before the District Court at the time it issued its order, it is not properly part of the record on appeal and should be stricken from the Excerpts of Record. *See Kirshner v. Uniden Corp. of America*, 842, F.2d 1074, 1077 (9th Cir.

1988). Thus, the Court should not give any consideration to the Amended Complaint in adjudicating this appeal. *See id.* at 1078.

Accordingly, the County requests that the Court strike the Amended Complaint from the Excerpts of Record and any such references to the Amended Complaint in support of their Opening Brief.

Dated: March 31, 2000

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
RICHARDS, WATSON
& GERSHON
A Professional Corporation

By: _____
Sayre Weaver
Attorney for Appellees
Mary V. King, Gail Steele,
Wilma Chan, Keith Carson,
Scott Haggerty, the
County of Alameda,
and the County of Alameda
Board of Supervisors

Resp. App. 14

No. S091549

In the Supreme Court
of the
State of California

RUSSELL ALLEN NORDYKE, et al.
Plaintiffs/Appellants/*Petitioners*

v.

MARY V. KING, et al.
Defendants/ Appellees/*Respondents*

On Certification from the
United States Court of Appeals for the Ninth Circuit
Case No. 99-17551

On Appeal from the United States District Court
for the Northern District of California
The Honorable Martin J. Jenkins,
District Judge Presiding
Case No. DC# 99-4398-MJJ

MOTION TO STRIKE PORTIONS OF APPELLANTS'-PETITIONERS' OPENING BRIEF

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MOTION TO STRIKE PORTIONS OF APPELLANTS'-PETITIONERS' OPENING BRIEF; DECLARATION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT.

Pursuant to Rules 13 and 18 of the California Rules of Court, Defendants-Appellees-Respondents Mary V. King, Gail Steele, Wilma Chan, Keith Carson, Scott Haggerty, the County of Alameda, and the County of Alameda Board of Supervisors (collectively "County") move this Court for an order that Appellants'-Petitioners' Opening Brief ("Petitioners' Opening Brief") be returned and corrected by removal of certain portions of Petitioners' Opening Brief, namely the material cited by Petitioners' in their Opening Brief which is alleged *only* in their Amended Verified Complaint ("Amended Complaint") and the references to their Amended Complaint identified below, **on the grounds that the Amended Complaint had not been filed and was not before the United States District Court for the Northern District of California ("District Court") when it entered the order from which Petitioners appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").** *See People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993. Thus, it is improper for Petitioners to rely on material in the Amended Complaint and to cite to the Amended Complaint to support their Opening Brief.

The portions of the Opening Brief to which the County objects here are:

1. Page 3 of Petitioners' Opening Brief, paragraph 2 beginning with the sentence on Page 3 of Brief, stating "Plaintiff/Appellant JESS B. GUY is an Attorney at Law, shooting enthusiast and collector of used and antique firearms." to the end of that paragraph, ending with the sentence on Page 5 of Brief, stating "All of the foregoing plaintiff/appellants are frequent Exhibitor, Patrons and Vendors at the TS TRADE SHOWS held at the Alameda County Fairgrounds."

2. Page 5 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit B];" "[ER, Tab 16, Exhibit A];" "[ER, Tab 16, Exhibit H]."

3. Page 5 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit [sic]]."

4. Page 6 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."

5. Page 6 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit F]."

6. Pages 6 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, Exhibit G]."

7. Page 8 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, page 2];" "[ER, Tab 16, Exhibit E]."

8. Page 37of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."

9. Page 38 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, pg. 002, ¶ 5]."

10. Page 39 of Petitioners' Opening Brief, first paragraph, as follows: "[ER, Tab 16, Exhibit E];" "[ER, Tab 16, Exhibit D]."

11. Page 40 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, Exhibit K]."

This motion is made pursuant to Rules 13 and 18 of the California Rules of Court and *People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993 on the grounds that the Amended Complaint was not before the District Court when it entered the Order from which Petitioners appealed and thus is not properly part of the record before this Court. Accordingly, the material found only in the Amended Complaint and all references to the Amended Complaint should be stricken from Petitioners' Opening Brief. This motion is based on this notice, the attached declaration of Sayre Weaver, the attached memorandum of points and authorities, and the record on appeal and briefs on file in this matter.

Dated: March ___, 2001

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
RICHARDS, WATSON &
GERSHON
A Professional Corporation

By: _____
Sayre Weaver
Attorneys for Appellees
Mary V. King, Gail
Steele, Wilma Chan,
Keith Carson, Scott
Haggerty, the County of
Alameda, and the
County of Alameda
Board of Supervisors

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rules 13 and 18 of the California Rules of Court and *People v. Brawley* (1969) 1 Cal.3d 277, 294-295 *cert. denied* (1971) 400 U.S. 993, the County seeks an order requiring Petitioners to correct their Opening Brief by removing the material in their Brief which is alleged *only* in their Amended Verified Complaint ("Amended Complaint") together with all references to the Amended Complaint on the grounds that the Amended Complaint was not before the United States District Court when it entered the Order from which Petitioners have appealed. This motion seeks to limit Petitioners' Opening Brief to evidence before the District Court when it entered the

order from which Petitioners appealed to the Ninth Circuit.

In the Ninth Circuit, the County also moved to strike the portions of Appellants-Petitioners' Excerpts of Record designating the Amended Complaint as part of the Record [Excerpts of Record, Tab 16] and portions of Appellants-Petitioners' Opening Brief citing to the Amended Complaint. The Ninth Circuit Court of Appeals never ruled on the County's motion to strike. A true and correct copy of the County's motion to strike filed in the Ninth Circuit is attached here as Exhibit "1." [Declaration of Sayre Weaver, ¶ 3 and Exhibit "1" thereto]

On September 17, 1999 Plaintiffs Russell Allen Nordyke and Sallie Ann Nordyke, dba TS Trade Shows filed their original complaint, naming Alameda County, the Alameda County Board of Supervisors as a body, and naming each of the individual board members, and challenging the Ordinance on First and Fourteenth Amendment grounds, and seeking damages and injunctive relief and a declaration based upon a state preemption claim. No other parties appeared as plaintiffs in the original complaint. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 1)] On September 30, 1999, Petitioners moved the District Court for a temporary restraining order to enjoin the application of the Ordinance. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 12)] On or about September 28, 1999, the County filed an opposition to the Petitioners' motion for a temporary restraining order. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 29)]

On October 28, 1999, the District Court heard arguments on Petitioner's motion for a temporary restraining

order. On November 3, 1999, the District Court entered its order denying Petitioners' motion for a temporary restraining order. [Decl. of Sayre Weaver at ¶ 5 and Exhibit "3" thereto]

On October 7, 1999, the County filed a motion to dismiss the original complaint. [Decl. of Sayre Weaver at ¶ 4 and Exhibit "2" thereto (Docket # 45)] Petitioners did not file a response to the motion to dismiss, but instead on November 10, 1999, and *after* the District Court's November 3, 1999 denial of Petitioners' motion for a temporary restraining order and preliminary injunction, Petitioners filed an Amended Verified Complaint, adding 12 individual plaintiffs (which plaintiffs are referred to in Petitioners' Opening Brief before this Court), some allegations and exhibits and switching the order of the fourth and fifth claims. [Decl. of Sayre Weaver at ¶ 6 and Exhibit "4" thereto]

Here, Petitioners filed the Amended Complaint with the District Court *after* the District Court entered its order denying the Petitioners' motion for a temporary restraining order and preliminary injunction – the order they appealed from to the Ninth Circuit. Specifically, Petitioners filed their Amended Complaint on November 10, 1999 – twelve days *after* the hearing on the motion for a temporary restraining order and preliminary injunction and *seven days after the District Court entered its order* denying their motion. Because the Amended Complaint was not presented to the District Court and is not properly part of the record on appeal, this Court cannot consider it. *See Brawley* 1 Cal.3d 277, 294-295 (rejecting defendant's request to augment the record on appeal to include the copies of the complaint and arrest warrant because "[t]he complaint and arrest warrant were not before the trial court, and it

is an elementary rule that ordinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal"); *People v. Pearson* (1969) 70 Cal.2d 218 (explaining that material not before the trier of fact is not part of record on appeal from judgment and thus the court on appeal is not authorized to augment the record with material not before the trier of fact). *See also McConnell v. All-Coverage Ins. Exch.* (1964) 229 Cal.App.2d 735, 749 (explaining that the reviewing court reviews the orders of the trial court on the "record then before the trial court. If events occur, subsequent to the issuance of the orders appealed from, which render inequitable or improper the enforcement of such orders, appellant's remedy is by appropriate motion in the trial court after the remand to it.").

Accordingly, the County objects to and seeks an order requiring Petitioners to strike the material set forth below from Petitioners' Opening Brief and file a corrected brief with this Court or in the alternative that the Court correct Petitioners' Opening Brief by interlineation or enter an order indicating it has disregarded the material set forth below from Petitioners' Opening Brief :

Portions of Petitioners' Opening Brief contained only in Amended Complaint which the County moves to strike:	Grounds for Motion to Strike:
1. Page 3 of Petitioners' Opening Brief, paragraph 2 beginning with the sentence on Page 3 of Brief, stating "Plaintiff/Appellant JESS B. GUY is an Attorney at Law, shooting enthusiast and	1. These plaintiffs are identified only in the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from

collector of used and antique firearms." to the end of that paragraph, ending with the sentence on Page 5 of Brief, stating "All of the foregoing plaintiff/appellants are frequent Exhibitor, Patrons and Vendors at the TS TRADE SHOWS held at the Alameda County Fair-grounds."	which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.*

With reference to the following citations to the Amended Complaint in support of Petitioner's Opening Brief, the facts cited are also set forth in the Original Complaint [Excerpts of Record, Tab 1] or are otherwise contained in the record. However, Petitioners' citation to the Amended Complaint in support of these facts is improper because the Amended Complaint was not before the District Court when it entered its Order from which Petitioners have appealed. Accordingly, the County objects to and moves to strike the references to the Amended Complaint as set forth fully below:

References in Petitioners' Opening Brief to Amended Complaint which the County moves to strike:	Grounds for Motion to Strike:
1. Page 5 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit B];" "[ER, Tab 16, Exhibit A];" "[ER, Tab 16, Exhibit H]."	1. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended

	Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
2. Page 5 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit [sic]]."	2. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley supra*.
3. Page 6 of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."	3. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
4. Page 6 of Petitioners' Opening Brief, second full paragraph as follows: "[ER, Tab 16, Exhibit F]."	4. This reference to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order that Petitioners have appealed.

	The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to evidence in the Record on the Amendment of the Ordinance [ER, T13 at 6-11].
5. Pages 6 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, Exhibit G]."	5. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
6. Page 8 of Petitioners' Opening Brief, last full paragraph as follows: "[ER, Tab 16, page 2];" "[ER, Tab 16, Exhibit E]."	6. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.

7. Page 37of Petitioners' Opening Brief, first full paragraph as follows: "[ER, Tab 16, Exhibit E]."	7. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.* Petitioners should have cited to the Original Complaint.
8. Page 38 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, pg. 002, ¶ 5]."	8. This reference is to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra.* Petitioners also cited to the Original Complaint at [ER, Tab 1 at 3, ¶ 10] and should have cited only to this evidence in the Original Complaint.
9. Page 39 of Petitioners' Opening Brief, first paragraph, as follows: "[ER, Tab 16, Exhibit E];" "[ER, Tab 16, Exhibit D]."	9. These references are to the Amended Verified Complaint [ER, Tab 16] – a document not before the District Court when it entered its Order from which Petitioners have

	appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.
10. Page 40 of Petitioners' Opening Brief, second full paragraph as follows: "[Tab 16, Exhibit K]."	10. These references are to the Amended Verified Complaint [ER, tab 16] – a document not before the District Court when it entered its Order that Petitioners have appealed. The Amended Complaint is not properly part of the record on appeal. *See Brawley, supra*. Petitioners should have cited to the Original Complaint.

For the above reasons, the County seeks an order requiring Petitioners to strike the material set forth below from Petitioners' Opening Brief and file a corrected brief with this Court or in the alternative that the Court correct Petitioners' Opening Brief by interlineation or enter an order indicating it has disregarded the material set forth above from Petitioners' Opening Brief.

Dated: March ___, 2001

RICHARD WINNIE
COUNTY COUNSEL,
COUNTY OF ALAMEDA

SAYRE WEAVER
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Scott Haggerty, the
County of Alameda, and
the County of Alameda
Board of Supervisors

No. 99-17551 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs-Appellants,

vs.

MARY V. KING; et al.,
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLAINTIFF/APPELLANTS' MOTION TO CONDUCT SUPPLEMENTAL BRIEFING ON CONSTITUTIONAL ISSUES

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MOTION TO SUBMIT SUPPLEMENTAL BRIEFING

Plaintiff/Appellants hereby apply to this Court for permission to file Supplemental Briefs on the Federal Constitutional issues in the above-entitled action. The reasons for the request are as follows:

1. In its September 12, 2000 Order certifying a question to the California Supreme Court, this Court ordered a stay of these proceedings. Therefore, the parties were precluded from applying to this Court to conduct supplemental briefing on important post-submission issues that have been raised by events outside the scope of this litigation.

2. In its July 26, 2002 Order inviting the parties to file simultaneous supplemental brief, the court limited the issues to be address to "the impact of the California Supreme Court's answer to the question certified on September 12, 2000." A fair reading of that order does *not* invite the parties to brief any other issues.

3. As noted in Plaintiff/Appellants' Supplemental Brief, a wholly new legal issue, with respect to Second Amendment standing issues, has arisen since submission of this case to this panel and the California Supreme Court's decision. On June 10, 2002, the U.S. Supreme Court denied certiorari in the case of *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001); leaving in place a decision that is somewhat in conflict with decisions in this Circuit. Furthermore, in its brief opposing certiorari before the U.S. Supreme Court, the Solicitor General and Attorney General, clarified the United States Government's position with respect to Second Amendment standing issues.

Though not raised the parties, the issues is fairly before this Court based upon the District Court's *Order Denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.* See: page; 13, line 21 *et seq.* Whatever Second Amendment rights the Plaintiff/Appellants might have – when coupled with the First Amendment issues already before this Court – could end up being dispositive of the case.

4. Several cases have been decided by the United States Supreme Court and the Ninth Circuit Court of Appeals that may have important ramifications on the Federal Constitutional Issues still pending before this Court. The following is a partial list of such cases:

   A. *Watchtower Bible and Tract Society of New York, Inc., et al., Petitioners vs. Village of Stratton et al.* (June 17, 2002) ___ U.S. ___, 122 S. Ct. 2080; 153 L. Ed. 2d 205.

   B. *Tommy G. Thompson, Secretary of Health and Human Services, et al., Petitioners vs. Western States Medical Center et Al.* (April 29, 2002) ___ U.S. ___, 122 S. Ct. 1497; 152 L. Ed. 2d 563.

   C. *John D. Ashcroft, Attorney General, et al., Petitioners vs. the Free Speech Coalition et al.* (April 16, 2002) ___ U.S. ___, 122 S. Ct. 1389; 152 L. Ed. 2d 403.

   D. *Good News Club, et al. vs. Milford Central School* (June 11, 2001) 533 U.S. 98; 121 S. Ct. 2093; 150 L. Ed. 2d 151.

   E. *Venetian Casino Resort vs. Clark County, et al* (July 12, 2001) 257 F.3d 937. Certiorari Denied March 4, 2002, Reported at; 2002 U.S. LEXIS 1402.

F. *Gary Edwards vs. City of Coeur D'alene et al.* (August 21, 2001) 262 F.3d 856.

G. *Mae Culbertson vs. Oakridge School District, et al.* (August 7, 2001) 258 F.3d 1061.

5. The parties concentrated on the preemption questions in their principal briefs. In their 51 page, *Opening Brief*, Plaintiff/Appellants devoted only 10 pages to the First Amendment issues. In their 45 page, *Brief of Appellees*, the Defendant/Appellees devoted only 12 pages to the First Amendment issues. In their *Reply Brief*, Plaintiff/Appellants devoted only 5 pages to the First Amendment issues. This Court's certification of the preemption issues to the California Supreme Court, makes it readily apparent that this Court and the litigants were relying heavily on the preemption issues to resolve the case. Now that First Amendment issues predominate, it makes sense to order supplemental briefing on those issues.

After the reply brief has been filed, no further briefs are allowed absent court permission. Thus, a party wishing to file a supplemental brief must file a motion with the court for permission to do so. [See FRAP Rule 28(c)]

Supplemental authority need not announce a departure from established authority. Any relevant authority coming to counsel's attention after the brief is filed or argument is made may be brought to the court's attention. *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 197, fn. 2 (9th Cir. 1989)

It is within this Court's power to order the parties to file supplemental briefs on the First Amendment issues still pending before this Court. If the Court is inclined to

agree with the Plaintiff/Appellants that further briefing is warranted, they hereby request an order so stating.

Date: August 19, 2002

Respectfully Submitted,

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.
Attorney for
Plaintiff/Appellants

Re: *Nordyke v. King* U.S. Ninth Circuit Case No. 99-17551
U.S. District Court, Case No. C 99 04389

PROOF OF SERVICE

I, Yeaser Ghalib, declare that I am employed in the City of San Jose, County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is: 1261 Lincoln Avenue, Suite 111; San Jose, California 95125-3030

On August 19, 2002, I served the following documents:

PLAINTIFF/APPELLANTS' MOTION TO CONDUCT SUPPLEMENTAL BRIEFING ON CONSTITUTIONAL ISSUES

on the following interested party(s) in this action:

Sayre Weaver, Esq.
RICHARDS WATSON & GERSHON
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VIA Federal Express

[XX] By contracting with a commercial carrier for delivery to the address listed above within three (3) calendar days from the date this declaration was executed, in accordance with Federal Rule of Appellate Procedure 25(a)(2)(B)(i), (ii). Said documents were also dispatched for filing with the Clerk of the Court for delivery by a third party commercial carrier pursuant to FRAP 25(a)(2)(B)(i), (ii). This was done by placing the appropriate number of copies in a prepaid Federal Express envelope, and placing them for pickup on before close of business on August 19, 2002.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 19, 2002, at San Jose, California.

/s/ Yeaser M. Ghalib
Yeaser M. Ghalib

No. 99-17551 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs-Appellants,

vs.

MARY V. KING; et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA MARTIN J. JENKINS, DISTRICT JUDGE, PRESIDING

PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING

ORIGINAL PANEL:
ARTHUR L. ALARCÓN, DIARMUID F. O'SCANNLAIN AND RONALD M. GOULD, CIRCUIT JUDGES

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I. INTRODUCTION AND STATEMENT OF COUNSEL

Plaintiff-Appellants hereby seek rehearing *en banc* of the February 19, 2003 Panel decision (Alarcón, A., O'Scannlain, D. and Gould, R.) concerning an issue of national significance arising under the Second Amendment to the United States Constitution. The Panel held that it was foreclosed from reaching the merits of *Plaintiff-Appellant's* challenge to a local ordinance based upon this Circuit's holding in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996) that individuals lack standing to seek any protections under the Second Amendment.

Plaintiff-Appellants contend that a rehearing by the full court is necessary because the issues raised are of exceptional importance. For example: Judge Gould found that the controversy over the individual rights interpretation of the Second Amendment implicates issues of national security and preservation of the republic. With respect to the facts presented by this case – gun shows are events that take place throughout the rest of the country.

Furthermore, gun show legislation is currently pending in the United States Congress.[1] A further illumination of the constitutional boundaries of the "right to keep and bear arms" by the judiciary can only add substance to the policy considerations that will be addressed by executive and legislative branches of the federal government.

Plaintiff-Appellants would also note that current Ninth Circuit law, as set forth in *Hickman v. Block, supra; Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.); and *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) directly conflicts with an opinion out of the Fifth Circuit Court of Appeals: *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). We also assert that current Ninth Circuit law in this area conflicts with broad principles articulated by the U.S. Supreme Court.

II. IMPORTANCE OF THE ISSUE

The question *Plaintiff-Appellants* raise for *en banc* review is whether the Second Amendment guarantees an individual right. We contend that every law abiding, responsible adult has the right to acquire and possess ordinary small arms. That the question is one of major importance for the entire nation should be obvious.

In his concurring opinion Judge Ronald M. Gould found that the individual rights version of: *"The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat our republic could*

---

[1] McCain-Lieberman Gun Show Bill – SB 890.

degenerate to tyranny." Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003).

Judge Gould described in practical terms how the individual rights doctrine could fulfill those purposes. He also noted that *Silveira, supra* failed to adequately describe how the state's rights theory could accomplish even the limited constitutional objectives, set forth in the *Silveria* opinion, of providing a check and/or balance to a standing federal army.

> The *Silveira* majority takes the position that the Framers' concerns to check the possibility of a Federal government tyranny are sufficiently answered by reading the Second Amendment merely to ensure that the states could not be barred from funding state-organized militia. *Silveira*, 312 F.3d at 1085. I disagree. The Second Amendment cannot properly be interpreted to entrust the freedom of the people to the premise that state governments would arm a self-reliant people and protect the people against a federal tyranny. The practical concept of militia contemplates an armed citizenry capable of rising up, with what arms they hold or can find, to defeat, resist or at minimum delay an invader until more organized power can be marshalled. The likelihood of broad resistance from an armed citizenry is a deterrent to any would be invader. Equally important, the practical concept of militia, embracing an armed citizenry, stands to deter risk of government degradation to tyranny. This concept is weakened by *Silveira's* premise that the citizens could rely on their states to be an arsenal and repository for arms, and otherwise have no right.
>
> Judge Gould's Concurring Opinion
> *Nordyke v. King, supra*

The relationship between the federal government, and the states regarding military issues has previously been found to be of manifest importance[2]. *Plaintiff-Appellants'* case raises similar issues regarding the relationship among the federal government, the states and ***individuals,*** and is therefore also of manifest importance.

III. NINTH CIRCUIT LAW CONFLICTS WITH HOLDINGS FROM THE UNITED STATES SUPREME COURT, ANOTHER CIRCUIT AND FINDINGS BY THE UNITED STATES CONGRESS

A. Overview

Plaintiff-Appellants want to reiterate a point made before the *Nordyke* panel, we are *not* seeking wholesale invalidation of all state and local laws regulating firearms. An individual rights interpretation of the Second Amendment would not extend to criminals, children, the mentally unbalanced and persons subject to domestic violence restraining orders.[3] Arguably many of the gun laws in this state would not violate the Amendment *per se*.[4] [See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897)]

Ninth Circuit Second Amendment Jurisprudence – which is based upon a "collective and/or states' rights" theory – conflicts with another Circuit's "individual rights" interpretation,

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[2] *Perpich v. Department of Defense*, 496 U.S. 334, 339 (1990).

[3] *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001)

[4] See, e.g., Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203, 258-266 (1983) detailing gun controls that are valid under the individual right view of the Second Amendment.

and with Supreme Court opinions. As *Nordyke* states: "*We recognize that our sister circuit engaged in a very thoughtful and extensive review of both the text and historical record surrounding the enactment of the Second Amendment. And if we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in Emerson.*" *Nordyke v. King, supra*. And as Judge Gould states in the concurrence:

> I join the court's opinion, and write to elaborate that *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), about the "collective rights" theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an "individual rights" view of the Second Amendment, as was adopted by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), consistent with *United States v. Miller*, 307 U.S. 174 (1939). We should recognize that individual citizens have a right to keep and bear arms, subject to reasonable restriction by the government. We should also revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment. [footnotes omitted]

The rest of this brief is – of necessity – a critique of collective rights model set forth in the *Hickman, supra* and *Silveira, supra*. On the issue of 14th Amendment Due Process incorporation, even the *Silveira* panel concluded notwithstanding the standing issues, that the refusal to incorporate various provisions of the Bill of Rights though the 14th Amendment Due Process Clause, based upon the holdings of *United States v. Cruikshank*, 92 U.S. 542

(1876) and *Presser v. Illinois*, 116 U.S. 252 (1886) is based upon a now discredited view. Therefore, if *en banc* review is granted, it will also be necessary to revisit this Circuit's holding in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992).

B. History of the Amendment before *Miller*[5]

William Van Alstyne, a major figure in modern constitutional law, has noted:

> In recent years it has been suggested that the Second Amendment protects the 'collective right' of states to maintain militias, while it does not protect the right of 'the people' to keep and bear arms. If anyone entertained [that concept] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states [that theory].[6]

As Prof. Van Alstyne also notes, the Amendment has "generated almost no useful body of [case] law." Every major figure in American constitutional law who has addressed the Amendment declares it an individual right.[7] Are they all wrong?

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[5] *United States v. Miller*, 307 U.S. 174 (1939).

[6] William Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236, 1243, n. 19 (1994) (emphasis added) quoting from Stephen P. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984).

[7] Besides Van Alstyne *supra*, and Justice Story, *infra*, see; Thomas Cooley, The General Principles of Constitutional Law in the United States of America 298 (3d ed. 1898); Sanford Levinson, "The Embarrassing

(Continued on following page)

The very concept of the Amendment as something other than an individual right was unknown to the Founders and the following generations. Beyond the absence of the "collective rights" from the period 1787-91, the theory was equally unknown in the 19th Century.[8] Typical of 19th Century explanations of the Amendment's purposes is Mr. Justice Story's: "*One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms.*"[9] Surprisingly, neither *Silveira* nor *Hickman*, nor any other argument for the states' right position even mentions Justice Story's, or the other, 19th Century explanations of the Second Amendment.

Second Amendment", 99 YALE L. J. 637 (1989); Akhil Amar, *The Bill of Rights As a Constitution*, 100 Yale L. J. 1131, 1166 (1991); Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 134-35 (1999); Laurence H. Tribe, Vol. 1, 3rd Ed., AMERICAN CONSTITUTIONAL LAW 901-902, n. 221 (2000).

[8] David Kopel, "The Second Amendment in the Nineteenth Century," 1998 BRIG. YOUNG L. REV. 1359.

[9] J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1840; republished, 1893) cited by Prof. Kopel. supra at p. 1393 of 1998 BRIG. YOUNG L. REV. Other 19th Century constitutional exegesis he cites include: P. 1377, St. George Tucker (1803): the Second Amendment enshrines "The right of self defense [which] is the first law of nature."; Pp. 1385-88, William Rawle (1825): the right to arms does not protect the carrying of arms "for an unlawful purpose"; P. 1437 Lysander Spooner (1850): "This right to keep and bear arms implies the right to use them . . . as, for example, in defense of life, liberty, chastity, &c. . . ."; Pp. 1402 and 1469, Francis Lieber (1853) and Joel Tiffany (1868) both: analogizing the Second Amendment to the Third; P.. 1470, Timothy Farrar (1867): analogizing "The right of every person . . . 'to keep and bear arms'" to the rights of trial by jury, habeas corpus, due process and "divers other [rights] recognized by and held under the Constitution"; P. 1476, John Norton Pomeroy (1870): The clause guaranteeing "The right of the people to keep and bear arms . . . is analogous to the [clause] securing freedom of speech and of the press."

Though both the Supreme Court's, and the Founding Fathers', references to the Amendment are very brief, they all portray it as an individual right, usually lumping it together with the rest of the Bill of Rights without suggesting it is any less individual.[10] The Supreme Court, interpreting the phrase "right of the people" in the Fourth Amendment suggested that as used there and in the First and Second Amendments, it denotes rights of individuals.[11] In another case construing a statute punishing those who "carry" arms in connection with drug crimes, both the majority and dissenting opinions equated "carry" arms to the phrase "bear arms".[12]

Last, but scarcely least, the idea of the Amendment guaranteeing state power over the militia flies in the face of an unbroken line of federal case law dating back to 1820. Those cases hold that the states have no power over the militia *vis-a-vis* federal control.[13]

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[10] As to the Founders' references to the right to arms, see Original Meaning, *supra*, 82 MICH. L. REV. 223-4, 235 (quoting James Madison, Fisher Ames, Albert Gallatin and James Monroe) As to Supreme Court references see, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) and other cases there cited (using Second Amendment along with First and Fourth Amendments to illustrate personal rights that the Bill of Rights protects against government) and the cases discussed in David B. Kopel, "The Supreme Court's Thirty-Four *Other* Gun Cases: What the Supreme Court Has Said About the Second Amendment", 18 ST. LOUIS U. PUBLIC L. REV. 99 (1999).

[11] *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

[12] *Muscarello v. U.S.*, 525 U.S. 125, (1998).

[13] Inter alia, *Houston v. Moore*, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), *Martin v. Mott*, 25 U.S. 19 (1827) (president's power to call militia from state control into federal service), *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection because federal authority over the militia is paramount).

C. *United States v. Miller*

The only Supreme Court case to consider the Second Amendment at any length was *United States v. Miller, supra* which held an indictment should not have been dismissed on the blanket theory that the National Firearms Act violated the Amendment *ipso facto*. Neither of the defendants were, or claimed to be, members of the militia. Nor did the Court suggest they needed to allege such a status to challenge the statute under the Amendment. Instead, the *Miller* Court held that the validity of a law regulating sawed-off shotguns depends on whether they are the kind of firearms the Second Amendment protects individuals in possessing.

Dealing with the challenge on its merits, the Court held the Amendment guarantees possession of military-type weapons only. This is based on the Amendment's reference to a militia (which the Court expressly recognized included virtually the whole male population "bearing arms supplied by themselves"[14]). Having fixed on this military-weapon standard, the Court reversed the dismissal of the indictment because (for obvious reasons) there had been no trial to establish whether a sawed off shotgun is a military weapon, and the Court was not prepared to take judicial notice of that fact.[15]

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[14] 307 U.S. at 179: "The signification attributed to the term 'militia' appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators . . . [:] all males physically capable of acting in concert for the common defense. . . . [O]rdinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." Emphasis added.

[15] 307 U.S. at 178.

Miller reached this basically individual right result even though the individual right view was not argued to the Court. The matter went up from the trial court on the government's appeal and neither defendant appeared above. The only brief filed was the government's. Even more significant, the states' right-collective right view was actually presented to the Court in the brief for the United States[16] – yet the Court did not even address that argument, rather the Court cited 19th Century cases construing the right to arms provisions as an individual right.[17]

D. Conflicting Post-*Miller* Court of Appeals Cases

The states' rights theory appeared in a First Circuit case which only "followed" *Miller* chronologically but expressly refused to follow it doctrinally, asserting that *Miller* had not meant to establish a standard for future cases. *Cases v. U.S.*, 131 F.2d 916, 922 (1st Cir.1942).

Cases set the pattern for future circuit court cases, that adopted the states' right theory without any discussion of the historical, textual or legal points we raise herein. What followed was a series of terse circuit court cases that purport to follow a *Miller* "standard" without recognizing that they are instead following *Cases* which

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[16] It "argued that the [Second Amendment] right was a collective one that [only] protected the people when carrying arms as members of the state militia." Vol. 1, R. Cottrol, GUN CONTROL AND THE CONSTITUTION, xxvii (Introduction) (NY Garland, 1993).

[17] 307 U.S. at 179. For discussion of the cited cases under the unquestionably individual right in the Tennessee Constitution and their relation to *Miller* and the Second Amendment, see Glenn H. Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution," 61 TENN. L. REV. 647, 661 *et seq.* (1994).

expressly departed from *Miller*. Some of these cases involve – and state nothing more than – the unquestionably correct conclusion that felons have no rights under the Second Amendment.[18] On several occasions, individual judges have expressed disagreement with the states' right view.[19]

The *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) held that the Amendment protects an individual right, devoting more reasoning and analysis to the matter than all the prior circuit court opinions combined. (One judge dissented, on the erroneous basis that *Emerson's* Second Amendment discussion is dicta.[20])

E. Conflicting Ninth Circuit Decisions

Apparently the first[21] Ninth Circuit case to consider the issue was *Marchese v. California*, 545 F.2d 645, 646

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[18] See *eg.*, *U.S. v. Toner*, 728 F. 2d 115, 129 (2nd Cir. 1984), *Marchese v. California*, 545 F. 2d 645, 646 (9th Cir. 1976), *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *U.S. v. Johnson*, 497 F. 2d 548, 550 (4th Cir. 1974)

[19] *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J. dissenting from a denial or rehearing *en banc*), *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J. concurring), *United States v. Gomez*, 92 F.3d 770, 774, n. 7 (9th Cir. 1996) (Kozinski, J.).

[20] Even if it is not strictly necessary to deciding the case, language in an opinion that is clearly intended to dispose of a contention raised by a party is holding, not dictum. *Six Companies of California v. Joint Highway Dist.* (1941) 311 U.S. 180, 187, *Blair v. U.S.*, 147 F.2d 840, 849 (8th Cir. 1945).

[21] Although it should be noted that *Robertson v. Baldwin, supra* arose out of an appeal from the Northern District of California. This is significant because *Robertson* is a U.S. Supreme Court case that implicitly recognized the "right to keep and bears arms" as an individual right.

(9th Cir. 1976) which rejected the individual right view in a single sentence citing some of the other terse, circuit court cases. The next case was *Fresno Rifle & Pistol Ass'n. v. VanDeKemp*, 965 F.2d 723 (9th Cir. 1992). The panel in that case acknowledged the individual vs. states' right debate as an open question, but refused to decide the issue. [*Fresno*, at 729] Instead the *Fresno* panel, disposed of the case based on 19th Century Supreme Court case law holding that the Second Amendment restrains only the federal government, not the states. [*Fresno,* at 729 *et seq.*] But this was clearly erroneous because the opinion recognized the 19th Century case law[22] addressed a different (though analogous) point.[23]

Then *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996) concluded that individuals do not even have standing to raise a Second Amendment claim because that Amendment "guarantees [only] the right of the states to maintain [an] armed militia. . . ." It is ironic that

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[22] Those cases held that in and of themselves none of the Bill of Rights apply against the states – a point that is still good law today. What the opinion recognizes those cases did not address is 14th Amendment incorporation against the states (965 F.2d 730-31). There were 19th Century cases rejecting that theory as well, but they are, of course, no longer good law.

[23] Compare *Fresno* at p. 730 to Michael K. Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (Duke, 1986) "the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and to bear arms." See pp. 52, 53, 56, 72, 88, 140-1 and 164. See also Van Alstyne, supra, 43 DUKE L. J. 1251-53 (1994), Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment", 103 YALE L. J. 57, 84, 98 (1993); Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992).

Hickman sees this conclusion as deriving from *U.S. v. Miller*, and following cases, since it exactly reverses what *Miller* actually did as to standing. Recall that the *Miller* Court entertained a Second Amendment challenge from two men who made no claim to membership in the militia.

In the wake of the 5th Circuit's *Emerson, supra* decision, a panel of this Court sought to shore up the states' rights position in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), discussed *infra*. This position was disavowed by the *Nordyke* panel.

F. Inadequacies of *Silveira's* Analysis

Current Circuit opinions refuse to consider Second Amendment issues on the basis that the Circuit position is fixed by *Hickman*.[24] We respectfully submit that rehearing *en banc* is required to either: a) repudiate the states' right view, or b) establish an intellectually valid basis for it by addressing the following problems Silveria fails to adequately deal with (or ducks entirely):

1. The mechanics of the standing issue, unstated in *Hickman*, and vaguely expressed in *Silveira*, necessarily implies that any litigation brought to remedy a breach of the right "to keep and bear arms" can only be addressed through a suit brought by the states on behalf of "the people." In effect, the states must assume the role of *parens patriae* on

[24] See, e.g., *United States v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *United States v. Hancock*, 231 F.3d 557 (9th Cir. 2000); *United States v. Mack*, 164 F.3d 467 (9th Cir. 1999); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996); and *United Stats v. Gomez*, 92 F.3d 770 (9th Cir. 1996) [*contra:* fn. 7]

behalf their citizens. This is contrary to doctrines articulated by the U.S. Supreme Court. *"The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those Prohibitions."* [*City of Boerne v. Flores*; 521 U.S. 507, 524 (1997)] Construing the "self-executing" provisions of the 15th Amendment in *South Carolina v. Katzenbach*; 383 U.S. 301, 324 (1966), the U.S. Supreme Court stated: "*Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen. Massachusetts v. Mellon*, 262 U.S. 447, 485-486; *Florida v. Mellon*, 273 U.S. 12, 18."

2. Neither *Silveira*, nor any other decision advancing the states' right theory mentions – much less reconciles – the Supreme Court's holdings that states have no power over the militia as against federal control. (See fn. 13 *supra*.)

3. *Silveira* offers no reconciliation of the Amendment's use of the term of art "right of the people" used in several other parts of the Bill of Rights. Are we to believe that the First Congress used "right of the people" to mean a right of individuals in the First Amendment, but 16 words later in the Second it means a right of the states, but 26 words later in the Fourth it means a right of individuals?

4. *Silveira* offers no answer to *Emerson's* point that, "*As used throughout the Constitution,*

the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority, never 'rights.'" *U.S. v. Emerson*, 270 F.3d at 227.

5. Then there are the Ninth and Tenth Amendments which specifically provide illumination with respect to people's ***rights and powers*** and the states' mere ***powers***.[25]

6. *Silveira* gratuitously assumes an inconsistency between the Amendment's intent of guaranteeing a right to people and of protecting the militia. But, as *Emerson* states, the "*'amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.'*" *Emerson*, 270 F.3d at 235.

7. In assuming the Amendment has no individual right content, *Silveira* ignores the philosophical heritage of the Founders who took from Hobbes, Locke, Montesquieu, Blackstone, etc., the beliefs that: a) the right to arms for defense of self and family is a fundamental human right derived from the sacred right of self-defense; b) that the governed had the right to alter or abolish

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[25] *Cf. Katzenbach, supra* [at p. 323]: *"The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."* [Another instance of distinguishing between people/persons and the states.]

oppressive forms of government; and c) that sovereignty, with all the implications that term connotes, resides in "the people."

8. With respect to *Silveria's* historical/textual analysis, that opinion fails to address Madison's initial proposal to interlineate the Bill of Rights into the sections of the Constitution in which they were relevant. Madison intended to insert the First, Second, Fourth and other Amendments that guarantee individual rights into Article I, § 9 and Article III, § 2 which contains the original Constitution's few individual rights guarantees (jury trial; ban on ex post facto laws, etc.); but Madison's scheme called for the Tenth Amendment, dealing with state powers, to go into a new and entirely different Article VII. See: *Emerson, supra*, 270 F.3d at 246, fn. 54.

9. The *Hickman* and *Silveira* decisions are also in conflict with the legislative and executive branch interpretations of the "right to keep and bear arms." Congress has declared the Second Amendment to be a right of citizenship.[26] See, e.g., Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986). Based upon the Solicitor General's brief urging the Supreme Court to deny certiorari in the *Emerson* case, the

[26] See also: Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 TENN. L. REV. 597 (1995).

executive branch of our federal government is in accord.[27]

IV. CONCLUSION RE: *EN BANC* REHEARING

It may be inevitable that the Second Amendment Jurisprudence will end up being addressed by the U.S. Supreme Court. If that happens, and the decisions of the Ninth Circuit are to be reviewed by that body, then the legal scholarship that is to carry the prestige of this Court should be vetted by the entire panel so that only a balanced and thorough rendering of the law from this Circuit is subjected to Supreme Court analysis.

Hickman v. Block, supra was a fluke[28] that has worked to the advantage of those who would seek to perpetuate a binary approach to Second Amendment issues. *Silveria v. Lockyer, supra* seeks to perpetuate an error that will prevent any further illumination of this important topic by foreclosing any litigation regarding the Second Amendment. The Second Amendment will then become a vestigial Amendment, not due to any lack of cases and/or controversies, like the Third Amendment[29], but because the Courts have chosen to close their doors on this issue and refuse to aid the executive and legislative branches in

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[27] A request for judicial notice of these official documents was granted by the *Nordyke* panel. The Solicitor General's brief is available at: *http://www.usdoj.gov/osg/*.

[28] Fluke, n. an accidental advantage; stroke of good luck; an accidentally successful stroke as in billiards. *Webster's New Universal Unabridged Dictionary* (1994)

[29] Although see: *Engblom v. Carey*; 677 F.2d 957 (2nd Cir. 1982) for modern decision finding the Third Amendment incorporated as against state action through the 14th Amendment Due Process Clause and an individual right vindicated by this otherwise dormant amendment.

deciphering one of the most important issues facing our nation.

As Judge Gould stated in his concurring opinion in *Nordyke v. King*:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the Complementary efforts of lawyers, scholars and judges.n10 The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.n11

-------Begin Concurring Opinion Footnotes-------

[10] The law develops through interdependent actions of academics advancing theories, advocates championing them in litigation, and Judges making decisions that clarify doctrine. The process is ongoing, for after decisions, academics will critique and offer suggested improvements, advocates will bring cases arguing what Judges said as refined by academic feedback, and more refined decisions result from this process. See Hon. Wade H. McCree, Jr., The Annual John Randolph Tucker Lecture, Partners in a Process: The Academy and the Courts, 37 Wash. & Lee. L. Rev. 811, 1041 (1981).

[11] In my view it is an error, though understandable one, to view the Second Amendment exclusively or primarily with the issue in mind of whether it constrains gun control. That controversial issue, as important as it may be, can be a distorting lens through which to view the Amendment if it clouds judgment and prevents understanding of the basic purposes of the Second Amendment. Instead, the Second Amendment should be considered in light of its core purposes of protecting the nation's safety from external threat or internal tyranny. However, recognition of individual right

in the Second Amendment, to protect national security, is not inconsistent with reasonable regulation, which may be permissible under several theories: (1) all weapons are not "arms" within the meaning of the Second Amendment; (2) "arms" protected may be limited to those consistent with use by an organized military force, as suggested in *Miller*; and (3) important government interests may justify reasonable regulation.

---------End Concurring Opinion Footnotes---------

Plaintiff-Appellants respectfully request that the Ninth Circuit – sitting *en banc* – take up the Second Amendment and give it a full hearing before this august body.

V. PETITION FOR PANEL REHEARING

Plaintiff-Appellants respectfully submit that four (4) factual issues were overlooked by the Panel with respect to the First Amendment issues.

1. "The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there." *Nordyke v. King*, 229 F.3d 1266, 1268. (Certification Order)

2. "[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible." *Nordyke v. King*, 27 Cal. 4th 875, 882. (California Supreme Court Opinion)

3. The statistical analysis of, and declarations by vendors, exhibitors and patrons of guns

shows stating the reasons for attending guns shows. [ER, Vol. I, Tabs 2 & 5]

4. The uncontroverted testimony – via declaration – of the Nordykes stating that it is impossible to hold a gun show without guns present. [ER, Vol. I, Tabs 3 & 4]

Footnote 3 in this Panel's decision noted that its holding does not foreclose a future "as applied" challenge to the Ordinance. *Plaintiff-Appellants* contend that no future challenge is necessary as there is ample evidence that the ordinance *in fact* stops gun shows from occurring and there are two judicial findings that the ordinance has that effect.

The *Nordyke* opinion assumes that a gun show is just an occasion for selling guns; that selling guns is not protected speech; and, while some people may engage in protected speech at gun shows (e.g. exhibiting their gun collections, engaging in Civil War re-enactment) those are merely auxiliary activities which can only be the subject for an "as applied" challenge to the ordinance. On the contrary, the *Plaintiff-Appellant* gun show operators (the Nordykes) are not in the business of selling guns. They are in the business of: a) selling space at the show to exhibitors, many of whom sell nothing, but rather just exhibit guns as part of artistic or other endeavors; and b) by charging admission to attendees who come to look at what is exhibited, many of whom buy nothing.

To say that an ordinance aimed at making gun shows impossible does not on its face infringe on the First Amendment is comparable to saying that Defendants could ban plays without infringing the First Amendment because playhouses generally offer to sell refreshments to

the audience – which sales are not protected by the First Amendment. Recall: The lead Defendant in this case MARY V. KING issued a press release and authored a memorandum[30] admitting that the ordinance was designed to ban gun shows, and both this Court and the California Supreme Court recognize that that is its actual effect.

Plaintiff-Appellants respectfully request either a Panel Rehearing on this limited issue, or further guidance from the Court on what kind of facts it would find persuasive that are not already part of the record.

Dated: April 1, 2003

RESPECTFULLY SUBMITTED,

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.
Attorney for *Plaintiff-Appellants*

[30] See: ER, Vol II, Tab 16, Sub-Tabs D & E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; ANN SALLIE NORDYKE, dba TS Trade Shows; JESS B. GUY; DUANE DARR; WILLIAM J. JONES; DARYL DAVID; TASIANA WERTYSCHYN; JEAN LEE, TODD BALTES; DENNIS BLAIR; R.A. ADAMS; ROGER BAKER; MIKE FOURNIER; VIRGIL McVICKER,

Plaintiffs-Appellants,

v.

MARY V. KING; GAIL STEELE; WILMA CHAN; KEITH CARSON; SCOTT HAGGERTY, COUNTY OF ALAMEDA; THE COUNTY OF ALAMEDA BOARD OF SUPERVISORS,

Defendants-Appellees.

No. 99-17551

D.C. No. CV 99-04389 MJJ

ORDER

(Filed Sep. 06, 2002)

BEFORE: ALARCÓN, O'SCANNLAIN, and GOULD, Circuit Judges.

Appellants' motion for supplemental briefs is GRANTED. The parties are invited to file simultaneous supplemental briefs addressing the Federal Constitutional issues, including, inter alia, the impact of *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) on the ordinance prohibiting possession of firearms on county property. Briefs shall be filed with the Clerk of Court within twenty-one days of the date of this order and shall not exceed 7000 words.

Appellants' request for judicial notice is DENIED without prejudice to renewal in the course of supplemental briefing.

William and Mary Quarterly, 3d Series, Volume LV, Number 1, January 1998

The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship

Don Higginbotham

THE past fifteen years or so have brought heated debate on one aspect of the Second Amendment. Does its gun ownership language provide both a personal right to keep firearms – for protection and other private purposes such as hunting and recreation – and a collective right to defend society as a member of the militia? Historians such as Robert E. Shalhope, Lawrence Delbert Cress, and Joyce Lee Malcolm have addressed these issues.[1] They have been

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[1] Shalhope, "The Ideological Origins of the Second Amendment." *Journal of American History*, 69 (1982), 599-614; Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms, ibid., 71 (1984, 22-42; Shalhope and Cress, "The Second Amendment and the Right to Bear Arms: An Exchange," ibid., 587-931 Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Mass., 1994), Cress, rejecting any Second Amendment guarantee of gun ownership as a basic right: sees the amendment solely as reflective of Americans' belief in the citizen's collective obligation to defend society as a member of the militia. Shalhope and Malcolm view the amendment as recognizing both the individual's personal right and the collective rights to possess arms. Unlike Cress and Shalhope, Malcolm, in her very recent book, pushes the argument back beyond the ratification struggle over the Constitution and the Revolution itself to the English Bill of Rights and subsequent British laws and judicial writings. She

(Continued on following page)

joined in increasing numbers by members of the legal academy. The lawyers have concentrated on the individual rights question, which the great majority of them answer affirmatively.[2]

Virtually absent from these gun ownership and gun rights arguments, in both the legal and the historical literature, is what Americans had to say about control of the state militias before, during, and after the writing of the Constitution. The subject is important because it shows how radical was the shift from the states' total control of their militias to the sharing of that authority under the Constitution, how disturbing this development was to the Antifederalists, how James Madison dealt with Antifederalist concerns in the Second Amendment, and, finally, how the issue was gradually resolved in the first half of the nineteenth century. In all the discussions and debates, from the Revolution to the eve of the Civil War,

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contends that the ownership of guns, apart from any responsibility for the common defense, became a well-recognized right in England long before the American Revolution. In time, according to Malcolm, this attitude about gun rights became conventional wisdom in British America, as did certain other dimensions of English common law. It evolved and became generally understood and accepted, regardless of how often or in what form it received articulation. According to Malcolm, this "English influence on the Second Amendment is the missing ingredient that has hampered efforts to interpret its intent correctly," *In To Keep and Bear Arms*, xii.

[2] Scott Heller, "The Right to Bear Arms: Some Prominent Scholars Are Taking a New Look at the Second Amendment," *Chronicle of Higher Education*, 41 (July 21, 1995), A8, A12. See also "An Open Letter on the Second Amendment," a full-page ad from "Academics for the Second Amendment," ibid. (Aug. 11, 1995). A23. Thirty-one of the 51 signers are members of the legal academy. For a scathing attack on the individual rights view of the Second Amendment see Garry Wills, "To Keep and Bear Arms," *New York Review of Books*, 42 (Sept. 21, 1995), 62-73.

there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right.

The language of the Constitution provides the base for the militia control controversy in the late 1780s. Article I, Section 8 declares that "The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Although the states retain the authority to train the militia and to appoint its officers, Congress has the power "to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States." The Antifederalists gave initial definition and drive to the controversy over the meaning and application of these terms, but none of their proposals for limitations or prohibitions on the federalized militia appears in the Second Amendment, which, writes Leonard W. Levy, is "as vague as it is ambiguous."[3] It therefore became the responsibility of Congress, with some assistance from the Supreme Court, to implement the Constitution's militia clauses.

After showing that colonial and Revolutionary Americans were virtually of one mind in espousing a well-regulated militia under local authority, this article reviews the breakdown of that consensus brought about by the militia's performance in the War of Independence and during Shays's Rebellion. After looking into the militia provisions of the Constitution, it examines the Antifederalists'

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[3] Levy, *Original Intent and the Framers' Constitution* (New York, 1988), 341.

negative reactions to those provisions and their failure to accomplish their agenda in the Second Amendment. It then shows how Congress and the Supreme Court resolved the constitutional questions concerning the federalization of the militia for domestic purposes. That resolution, together with the limited extent to which the national government actually called out the militia in peacetime – the subject of the final part of this article – explains why, for all practical purposes, a long and hotly disputed ideological issue disappeared. That the states were rarely called on to send their militias into national service, however, proved no guarantee that the institution itself was, in the classic phrase, the great palladium of liberty that Antifederalists and other states' rights advocates claimed it to be.

In their newspaper and pamphlet responses to Britain's new imperial policy after the Seven Years' War, the colonists decried, among other ominous developments, the decline of the metropolitan militia and the increasing use of redcoats to preserve law and order in both the parent kingdom and its transatlantic dominions.[4] Americans asserted that if their civil officials encountered domestic commotions, they should appeal only to their local militias for support, a contention that reflected both their reading of the dangers of standing armies in English history and

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[4] T.A. Critchley, *The Conquest of Violence: Order and Liberty in Britain* (London, 1970); Tony Hayter, *The Army and the Crowd in Mid-Georgian England* (London, 1978); Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain*, 1765-1776 (New York, 1972); Hiller B. Zobel, *The Boston Massacre* (New York, 1970); John Shy, *Toward Lexington: The Role of the British Army in the Coming of the American Revolution* (Princeton, 1965).

their own colonial experience. It became a tenet of faith that colonial authorities should retain jurisdiction over their provinces' militias and other forces. That view brought displeasure to royal governors during the imperial wars, for the provincial assemblies claimed and exercised such power over the militia to set salaries, to authorize the stores and equipment to be raised, to determine the number of men called for service, to prescribe organization and training, and to forbid or limit duty outside their provinces. Consequently, American lawmakers hamstrung royal administrators and British officers who sought to establish control over colonial fighting men.[5] The colonists predictably reacted vigorously when royal governors in 1775 attempted to seize militia arsenals at Williamsburg and Concord, the latter episode igniting the War of Independence.

The pattern of home control of local military organizations continued in the Revolution. Both conviction and precedent explain why the language of the thirteenth article of the Virginia Declaration of Rights in 1776 resounded through similar state charters. The Virginia document declared "that a well-regulated militia, composed of the body of the people trained to arms, is the

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[5] The substantial literature on friction concerning control of provincial forces in wartime includes Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill, 1963), 297-309; Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789* (New York, 1971), chap. I; Alan Rogers, *Empire and Liberty: American Resistance to British Authority, 1755-1769* (Berkeley, 1974); Fred Anderson, *A People's Army: Massachusetts Soldiers and Society in the Seven Years' War* (Chapel Hill, 1984); and Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763* (Chapel Hill, 1986).

proper, natural and safe defence of a free state . . . and that in all cases, the military should be under strict subordination to, and governed by, the civil power." The new state constitutions gave the legislatures the power to mobilize the militia, and mustering them for campaigns usually required the approval of the state executive council, which the legislatures themselves elected in most states. For Congress or the army to attempt to take over the militias or to send them against their will outside their own states would constitute "a Subvertion of all Liberty," asserted Abraham Clark of New Jersey, who lectured the speaker of his state's assembly on the need to "Oppose Tyranny in all its Strides."[6] Noting that few if any structures symbolized state sovereignty more than the militia, Cress calls the institution "central to the political stability and constitutional balance that sustained a republican constitution."[7]

George Washington, critical of a system that at best provided poorly trained men for limited service in his Continental army, addressed the sensitive issue of militia control near the war's end in 1783. His "Sentiments on a Peace Establishment" a document that anticipates crucial elements of military policy debate for the next two centuries, proposed that America retain its Revolutionary practice of regular and state forces but with fundamental alterations in the militia system. Congress should create

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[6] "Virginia Bill of Rights," in S.E. Morison, *Sources and Documents Illustrating the American Revolution*, 2d ed, (Oxford, 1929), 151; Ruth Bogin, *Abraham Clark and the Quest for Equality in the Revolutionary Era, 1774-1794* (Rutherford, N.J., 1982), 22, 25.

[7] Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill, 1982), 73.

two classes of militia within each state, each more effectively organized than the present militias. The first and larger class would, as in the past, include all men from ages sixteen to fifty. It would represent an improvement over the old system in that its establishment, exercise, and weapons would be uniform in all the states. Even so, the class could hardly be trusted to meet the nation's most critical needs. For "amongst such a Multitude of People . . . there must be a great number, who from domestic Circumstances, bodily defects, natural awkwardness or disinclination, can never acquire the habits of Soldiers." The second class, drawn from the first, would be composed solely of young, able-bodied volunteers or draftees. While on active duty, this class would be under direct federal jurisdiction. Its primary task would be to resist "any sudden impression which might be attempted by a foreign Enemy," affording time for Congress to begin full-scale mobilization.[8]

Militia reform, like other schemes for empowering Congress under the Articles of Confederation, found a chilly reception. Washington's "Sentiments," though approved in revised form by a Congressional committee, elicited scant support in the full legislative body. In 1786, Henry Knox, secretary at war for the Confederation, advanced a militia plan that resembled Washington's blueprint in some respects and also responded to parochialists' fears that a nationalized

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[8] Washington, "Sentiments on a Peace Establishment," in John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, 39 vols. (Washington, D.C., 1931-1944), 26:374-98, quotations on 389, 389-90. An overall assessment of the Revolutionary militias' performance appears in Higginbotham, *War and Society in Revolutionary America: The Wider Dimensions of Conflict* (Columbia, S.C., 1988), 106-31.

militia might be corrupted and cease to embody republican virtue. Knox proposed that militiamen in federal training would hear lectures on the glories of republican institutions and would engage only in recreation and amusements that were morally and physically uplifting. Moreover, militia units called outside their states to deal with threats and emergencies would be returned in no more than a year, a provision Knox believed would dampen apprehensions of misusing the militia or turning the state troops into a standing army. Even so, Knox's recommendations suffered the fate of Washington's "Sentiments."[9]

The Articles referred to every state's maintaining "a well regulated and disciplined militia," yet they contained no authorization for the central government under any circumstance to assemble for training or any other reason even some small part of the state militias. Only the broadest interpretation of Congressional authority could read into the Articles a power to dictate militia regulations or responsibilities to the states. Short of amendments – and they required unanimous approval from the thirteen states – Congress could not reform the militias, even had it a mind to do so.[10]

Although the Confederation's main line of defense in the post-1783 years consisted of a single regiment under the control of Congress, the states proved unwilling to upgrade the militias on their own initiative. David Ramsay, a

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[9] Knox, *A Plan for the General Arrangement of the Militia of the United States* (Philadelphia, 1786). The best treatment of militia reform efforts, including congressional attitudes on the subject, is Cress, *Citizens in Arms*, chap. 5.

[10] Articles of Confederation, Article VI.

former South Carolina congressman, complained that "our governments are too relaxed to bear any [militia] system . . . attended with . . . time & expense,"[11] Part of the problem stemmed from opposition of local elites. In Virginia, for example, the legislature, responding to Washington's recommendation that the states replace their militia officers with former officers of the Continental army "so far as can be done without creating uneasiness and jealousy," authorized Governor Patrick Henry to make wholesale replacements.[12] Henry made a number of appointments but ran into strong resistance, for loss of office also meant diminution of the senior officers' local standing and influence. As one appointee who declined to accept his commission explained, he did not hail from one of the foremost Augusta County families and did not wish to be "an object of . . . utmost resentment." The following year, the legislature, beating a retreat, returned the displaced militia officers to their commands.[13]

The nationalists, persistent advocates of a more consolidated political union, saw the uneven performance of the Massachusetts militia in Shays's Rebellion as a

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[11] Ramsay to Knox, Mar. 12, 1786, in Robert L. Brunhouse, ed., *David Ramsay, 1749-1815: Selections from His Writings*, American Philosophical Society, *Transactions*, New Ser., 55, pt. 4 (Philadelphia, 1965), 98-99.

[12] Washington, "Sentiments on a Peace Establishment," 394.

[13] Robert Porterfield, quoted in Harrison E. Ethridge, "Governor Patrick Henry and the Reorganization of the Virginia Militia, 1784-1786," *Virginia Magazine of History and Biography*, 85 (1977), 436. Madison, in describing the opposition to the new law as limited to a minority of counties, may have underestimated the number of critics; Madison to Thomas Jefferson, Jan. 22, 1786, in William T. Hutchinson et al., eds., *The Papers of James Madison*, Congressional Series, 17 vols. (Chicago and Charlottesville, 1962-1991), 8:478.

further indication of the need for improving militia by the central government. In 1786, several thousand men took up arms, closed the courts in western counties, and threatened the Confederation's arsenal at Springfield. Some militia units in the insurgent counties supported the rebels. A battle between state troops and dissidents at Springfield produced defections to the rebel ranks. In time, the government forces prevailed, but not before the Confederation was gravely shaken.[14] Other states likewise suffered from postwar economic dislocation; would they be spared similar tumults? A less publicized confrontation had occurred almost simultaneously in New Hampshire. There, angry debtors led by militia officers surrounded the building in Exeter where the legislature was in session and announced that none could leave until the besiegers obtained an acceptable response to their petitions for relief. The following day, militia from the state's eastern towns dispersed the insurgents.[15] Everywhere, newspaper

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[14] Robert J. Taylor, *Western Massachusetts in the Revolution* (Providence, R.I. 1954), chap. 7; David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* (Amherst, Mass., 1980), chaps. 6-7; Cress, *Citizens in Arms, 95-97*. For recent interpretations of Shays's Rebellion see Richard D. Brown, "Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts," in Richard Beeman, Stephen Botein, and Edward C. Carter II. eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill, 1987), 113-27, and Robert A. Gross, ed., *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Charlottesville, 1993).

[15] Jeremy Belknap, *History of New Hampshire. . . .* 3 vols, (Boston, 1813), 2:360-64; Alan Taylor, "Regulators and White Indians: The Agrarian Resistance in Post-Revolutionary New England," in Gross, ed., *In Debt to Shays*, 145-50, Debtor violence on a lesser scale also took place in the backcountry from New Jersey to South Carolina. See Richard B. Morris, *The Forging of the Union, 1781-1789* (New York, 1987), 264-65.

essays and letters echoed Washington's exclamation that "combustibles in every State" menaced the tranquility of the states and the stability of the union itself.[16]

The authors of the federal Constitution saw a critical need to impose controls over the internal affairs of the states in general and over the state militias specifically, to counter domestic turmoils. They added a new component to the idea of a federalized militia as detailed by Washington, Knox, and several other generals of the Continental army. It now appeared insufficient to provide better training and a measure of Congressional oversight. Consequently, the Philadelphia Constitutional Convention gave Congress authority to employ the militia against the states or any of their citizens in certain cases involving internal disturbances and breaches of federal law.

Owing to a preoccupation with such major concerns as the structure of the central government and representation issues, the subject of militia control was not formally addressed by the full convention until August 6, when the committee of detail reported the first draft of a constitution. Surprisingly, in light of earlier negative views on militia reform and the presence in the convention of men who held such views, the delegates agreed with little debate to accept the committee's all-embracing language empowering the national legislature "to call forth the aid of the militia" not only to "repel invasions" but also "to execute the laws of the Union" and to "suppress insurrections." Some of

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[16] John K. Alexander, *The Selling of the Constitutional Convention: A History of News Coverage* (Madison, Wis., 1990), 20-21, 34, 54-55, 99-101, 142-43, 169-70 n. 65; Washington to Knox, Dec. 26, 1786, in W.W. Abbot et al., eds., *Papers of George Washington*, Confederation Series, 6 vols. (Charlottesville, Va., 1992-1997), 4:482.

the more state-minded delegates, however, favored a limit on the portion of any state's militia that might be subject to federally imposed rules for training and that might be called up for national service at one time. But these were mainly differences of degree; the idea of some measure of federal oversight and control in these two areas was questioned on the floor by only two delegates: Elbridge Gerry of Massachusetts and Luther Martin of Maryland. The task of dealing with the delegates' differences over this part of the militia wording fell on August 18 to a committee of eleven. Three days later, the committee reported militia language almost identical to that in the final document: Congress was "to make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the militia according to the discipline prescribed by the United States." The convention then agreed to accept the committee report in two votes: 9-2 and 7-4, the four negatives in the second vote coming from states that wished to reduce the federal role in training the militia.[17]

The militia provisions of the Constitution flew in the face of so much American thinking and experience and so became subject to Antifederalist attack. On December 12, 1787, at the Pennsylvania ratifying convention, the first to be held, Robert Whitehill introduced one of the most detailed Antifederalist resolutions on the militia to appear during the ratification contest. It stated "that the power of

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[17] Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed., 4 vols. (New Haven, 1937), 2:182, 323, 326, 330-33, 352, 355-56, 380-81, 382, 384-88, 390.

organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state and for such length of time only as such state shall agree."[18] Whitehill's resolutions set the stage for the militia debate that would be repeated in subsequent conventions and the press.

The absence of stated limits to Congressional control, asserted the Antifederalists, would generate repeated military interventions in the domains of the states and the lives of the people, especially because, as Patrick Henry warned, the Constitution did not define the meaning of executing the laws or suppressing insurrections.[19] Critics of the Constitution feared that only military coercion could hold together a consolidated republic in a sprawling country like the United States, with its diverse regions and heterogeneous population, but such use of force, declared the "Federal Farmer," would "very soon destroy all elective governments in the country, produce anarchy, or establish despotism."[20] Antifederalists warned that the people's resistance to unjust and discriminatory taxation would prompt the federal government to resort to arms. "Is it not well known," asked Virginia's George Mason,

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[18] Whitehill, resolution 11, in Merrill Jensen, John P. Kaminski, Gaspare J. Saladino, et al., eds., *The Documentary History of the Ratification of the Constitution*, 12 vols. to date (Madison, Wis., 1976-), 2:598, hereafter cited as *Documentary History Ratification*; For similar views expressed by Pennsylvania Antifederalist delegate John Smilie see ibid., 508-09.

[19] Henry's speeches, ibid., 10:1277, 1300.

[20] "Federal Farmer," ibid., 14:29.

"that what would be a proper tax in one State would be grievous in another?"[21]

An oft-repeated Antifederalist scenario explained how the sword would be employed. The national government would quite possibly be too shrewd to send a standing army to enforce the laws and intimidate the people, a step that would raise specters of Caesar, Cromwell, and George III. Rather, it would resort to the federalized militia; it would confuse the people by using the body of the people against the people. Mason had endeavored to address this fear at the Constitutional Convention. He wanted to preface the section on federalizing the militia by stating that to do so would have made it transparent that the purpose of the militia in national service was to protect freedom, not to threaten it. But Gouverneur Morris of Pennsylvania – supported by Charles Pinckney of South Carolina and Gunning Bedford of Delaware – called the Mason addition a slap in the face of American professional soldiers, "the military class of Citizens," and it met defeat.[22]

As Antifederalists saw it, the militia under federal control would possess all the evils associated with a standing army. Congress's power to impose harsh discipline would brutalize the militia into submission by fines,

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[21] George Mason's speech, ibid., 9:937; "Centinel 1" and "Dissent of the Minority of the Convention," ibid., 2:162, 635-39 passim; Henry's speech, ibid., 10:1300; Jackson Turner Main, *The Antifederalism Critics of the Constitution, 1781-1788* (Chapel Hill, 1961), 143-45.

[22] Mason's proposed preface to the militia language in Article I, Section 8 of the Constitution declared: "And that the liberties of the people may be better-secured against the danger of standing armies in time of peace"; Farrand, ed., *Records of the Federal Convention of 1787*. 2:616-17.

corporal punishment, and fear of death by court-martial. Having been thus transmogrified into myrmidons, citizen-soldiers would become the mirror image of European professionals. These "meer machines as Prussian soldiers" would lose their devotion to freedom and to the dignity of the individual as they became walled off from the body politic. Of course, some yeomanry might be too sensitive and independent-minded to be deceived or to knuckle under. It would be terribly distasteful, for instance, for Pennsylvania militiamen, many of them doubtless Quakers opposed to military obligations in principle and anti-slavery in sentiment, to be sent to Georgia to suppress slaves revolting for "*sacred liberty.*" To avert such defection or disobedience, the national administration would concentrate its energies on militiamen from "the young and ardent part of the community, possessed of but little or no property."[23]

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[23] Quotations from "Centinel III," "Philadelphiensis II," and "Federal Farmer," in Jensen et al., eds., *Documentary History Ratification*, 14:60, 253-54, 37-39; "Aristocrotis," "The Government of Nature Delineated," in Herbert J. Storing, ed., *The Complete Anti-Federalist*, 7 vols. (Chicago, 1981), 3:16.9; Jonathan Elliot, comp., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, 5 vols., 2d ed. (Philadelphia, 1861-1863), 2:552; Mason's speech, in Jensen et al., eds., *Documentary History Ratification*, 10:1269-70, 1271-72. A broadside published in Maryland, signed J.T. Chase and J.F. Mercer, endeavored to generate public opposition to the Constitution without a bill of rights, which should include "no whipping militia, nor marching them out of the state, without consent of the general assembly"; *Documentary History of the Constitution of the United States of America*, 5 vols. (Washington, D.C. 1894-1905). 4:641-42. Daniel Carroll informed Madison that the broadside had "alarm'd" many people with its "positive assertions"; May 28, 1788, in Hutchinson et al., eds., *Madison Papers*, 22:63.

Although the means might vary, the result would be the same: the militia would become, in effect, a standing army maintained by the states but controlled by the central government.[24] Militias might be dispatched from one end of America to the other to quell insurrections sparked by the most terrible oppressions, leaving their home states defenseless, particularly from Indians on the frontier. This military arm, the erstwhile palladium of liberty, would become an instrument of tyranny. As one Maryland "Farmer and Planter" put it, if you "think you are imposed upon by Congress[,] . . . your great Lords and Masters, and refuse or delay to pay your taxes, or do any thing that they shall think proper to order you to do, they can . . . send the militia of Pennsylvania, Boston, or any other state or place, to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters, and live in free quarters, until you get into a good humour, and pay all that they may think proper to ask of you, and you become good and faithful servants and slaves."[25] In sum, moaned John Smilie in the Pennsylvania convention, the militia, "the last resource of

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[24] Connecticut Antifederalists voiced some of the earliest fears that the federalized militia would become a standing army; Jensen et al., eds., *Documentary History Ratification*, 3:378, 427, 428-29.

[25] "Essay by A Farmer and Planter," in Storing, ed., *Complete Anti-Federalist*, 5:2,3. For examples of other predictions of federalized militia outrages see Jensen et al., eds., *Documentary History Ratification*, 2:509, 13:540. I find no evidence of Antifederalists quoting an intellectual ally, Sir William Blackstone, who wrote that English militiamen "are not compellable to march out of their counties, unless in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom," in *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-1769), 2:399.

a free people[,] is taken away" and put in the hands of Congress. "It ought to be considered as the last *coup de grace* to the *State governments*," lamented Luther Martin.[26]

Antifederalists objected in general to the Constitution's bestowal of concurrent powers on the federal government and the states, and nowhere did this shared authority appear more starkly than in the militia provisions. Antifederalists maintained that either the central government or the states would ultimately control the militia. This concern found vociferous expression in the Virginia convention. The new government would be consolidated in character, complained Henry, pointing to the militia language; Congress did not have to receive the approval of the states to call out the militia. The concept of shared jurisdiction was a myth: "To admit this mutual concurrence of powers will carry you into endless absurdity: – That Congress has nothing exclusive on the one hand, not the States on the other!" All such absurdities would resolve to the advantage of the central power. If, for example, a state needed its militia at the same time as the federal government, "Which call is to be obeyed, the Congressional call, or the call of the State Legislature? The call of Congress must be obeyed."[27]

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[26] Smilie's speech in the Pennsylvania convention and Martin, "Genuine Information VII," in Jensen et al., eds., *Documentary History Ratification*, 2:508-09, 15:411.

[27] For examples of attacks on the concurrent powers idea see Henry's speeches, ibid., 9:957-58, 10:1276 (quotation), 2309-11, 1429; Mason's speech, ibid., 9:936-37; William Grayson's speech, ibid., 10:1306.

Antifederalists sought means for redress – for tilting the balance toward the states' retaining greater control of their armed forces – by changing either the text of the Constitution or by adding a national bill of rights. At the Pennsylvania convention, they tried – and failed – to delay approval of the Constitution until adoption of amendments that would have included stipulations for lessening federal authority over the militias. Beginning with the Massachusetts convention, Federalists faced stiffer opposition and increasingly agreed to propose recommendatory amendments in a variety of areas. Massachusetts and four other states offered such recommendations.[28] When the First Federal Congress took up the issue of constitutional change in 1789, it had approximately one hundred separate proposals on a broad range of topics available for consideration.[29]

Because Madison, who introduced amendments in the House of Representatives after pledging to do so at the Virginia convention, supported almost exclusively stipulations guaranteeing individuals and collective rights, he

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[28] For a state-by-state analysis of the tactics and strategies of the Federalists and Antifederalists in the ratifying conventions see Michael Allen Gillespie and Michael Lienesch, eds., *Ratifying the Constitution* (Lawrence, Kan., 1989).

[29] Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore, 1991), xi, 14-28; Edward Dumbauld, *The Bill of Rights and What It Means Today* (Norman, Okla., 1957), 173-205. The number can be placed as high as 210 if one counts duplicate proposals, many of which did not relate to rights but instead focused on structural changes in the central government. In fact, structural "alterations formed a clear majority of both the 210 and the 200"; Bowling, "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic*, 8 (1988), 228.

avoided all recommendatory amendments that would have created structural changes in the Constitution, including weakening the power of Congress over the militia.[30] Recommendations for limiting the militia's numbers in federal employment, restricting its time under national control, regulating its out-of-state service, subjecting its rank and file to martial law, and providing for its training all failed to find their way into what became the Second Amendment. One measure advocated by some Antifederalists, freeing conscientious objectors from military participation, passed in the House but lost in the Senate. Still another proposal popular with some Antifederalists – that the militia would remain under state control except when in the employment of the United States – was introduced in the House but received little support, perhaps because it failed to go beyond the language already in the Constitution. In any case, Congress, composed largely of Federalists, showed no inclination whatsoever to mollify Antifederalists on the subject of the militia.[31] The members, with few exceptions, shared Madison's belief that a bill of rights should be a statement of general principles rather than a document that included particulars and policies that, in their view, were more properly determined by statute law.

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[30] Stuart Leibiger, "James Madison and Amendments to the Constitution, 1787-1789: 'Parchment Barriers,'" *Journal of Southern History*, 59 (1993), 441-68.

[31] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 12, 30, 38-39n, 182-85, 267, Charles A. Lofgren argues that the conscientious objector issue came up mainly in discussions of the militia rather than in regard to federal armies and navies because both Federalists and Antifederalists considered the Constitution as limiting the citizen's military obligation to compulsory service in the militia, in "Compulsory Military Service under the Constitution: The Original Understanding," *William and Mary Quarterly*, 3d Ser., 33 (1976), 61-88.

The Federalists, in refusing proposals for change, responded as they had done during ratification. They dismissed Antifederalist apprehensions as totally unrealistic. In The Federalist, Hamilton branded them as "far fetched and ... extravagant," and Madison dismissed them as "misguided exaggerations."[32] Denying that Congress would enact legislation that would be harsh or discriminatory toward states or large numbers of people, Federalists further contended that civilian officials, including judges, would almost always have the means to uphold federal law and maintain the peace without resorting to the nationalized militia or the army. William Samuel Johnson of Connecticut argued that the Constitution goes to great lengths to avoid military responses to internal difficulties: rather than "armed force.... the power which is to enforce these laws is to be a legal power vested in proper magistrates."[33] Consequently, as Virginia Federalists repeatedly pointed out, militias, with very rare exceptions, would remain under direct control of the states, which would be free to increase their arms and their training as they saw fit. Edmund Randolph reminded Virginia's convention that militia officers, appointed by and

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[32] Nos. 29, 46, in Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn., 1961), 185, 321.

[33] Jensen et al., eds., *Documentary History Ratification*, 3:546. For the same point see Hamilton, No. 27, in Cooke, ed., *Federalist*, 171-75. In Federalist No. 28, ibid., 176-8a, Hamilton conceded that there might be rare exceptions when force would be needed. Although he was unclear whether the federalized militia or regular troops would be employed in such circumstances, he stated that the decision would be made by the representatives of the people. He went on to say, in Federalist No. 29, ibid., 181-87, that the well-trained, properly disciplined federalized militia is preferable because standing armies are more likely threats to liberty.

subject to removal by the states, would hardly give up their state loyalties if and when they entered federal service. Randolph, reflecting other supporters' sentiments, ridiculed the opposition's lack of "common sense" in "interpreting this Constitution."[34]

The rhetoric of Antifederalists and Federalists will never enable us to understand fully what the members of the First Congress intended by the language of the Second Amendment: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The problem is that, with exceedingly few exceptions, we do not know how individuals in either camp understood the amendment as it moved through the Congress to the state legislatures. Neither side displayed unanimity of views about the strengths and weaknesses of the Constitution. Much has been said over the years about the difficulty of determining the original intent of the authors of the Constitution; the same holds true of those who voted – warmly or halfheartedly – for rights amendments or for the Bill of Rights itself, a subject that gained the serious attention of Congress only as a result of Madison's prodding in 1789.[35]

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[34] Jensen et al., eds., *Documentary History Ratification*, 9:1014, 1074, 1102, 10:1288 (quotation), 1289, 1293-94, 1295, 1311-12, 1324-25, 1486, 1531. Hamilton and Madison also stressed officers' loyalty to the states that appointed them as a safeguard against federal misuse of the militia, in Federalist Nos. 29, 46, in Cooke, ed., *Federalist*; 185, 321-22.

[35] Because the Senate did not initially hold open sessions, little is known about the details of its members' response to Madison's amendments. John Randolph, in New York City at the time the future Second Amendment reached the Senate, informed his stepfather, St. George Tucker, that "a Majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They [the senators] are afraid that the Citizens will

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We can only speculate about Madison's motives in introducing the Second Amendment. He may well have done so partly for psychological or symbolic reasons and partly to satisfy – in some measure, at least – the Virginia convention, which wanted not only alterations in the body of the Constitution that would have weakened jurisdiction over the militia but also a bill of rights containing militia language fairly close to Madison's own Second Amendment wording. By conceding something heavy in emotional content but then in substance, something that could be interpreted as each reader chose to do, Madison and his supporters in Congress probably hoped to calm Antifederalist fears. Without dealing with specifics, the amendment seems to imply that the concurrent power of the state and federal governments over the militia will not threaten the states or obstruct their use of the militia when not in federal service. That would include the states' arming and equipping their respective militias if Congress failed to do so. It can surely be seen as a confirmation of their views by that small number of Antifederalists who are known publicly to have favored citizens' right to keep arms for private purposes as well as for collectively defending society as members of the militia.[36] If most Antifederalist

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stop their full Career to Tyranny & Oppression." The House held open sessions, which enabled several men from the press to record its debates, though none did so in a full and systematic way. Much of what later appeared in print on the Bill of Rights debates in the House is technical and procedural rather than substantive. See Veir, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 55-223 passim, quotation on 293.

[36] Ibid, 19, 20. Although Jefferson, from Paris, plied Madison with suggestions for changes in the Constitution, particularly for adopting a national bill of rights, he failed to express any reservations about the militia clauses of the document. See especially Jefferson to Madison,

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writers feared that the central authority would make the militias so muscular that they might serve as a standing army, others saw another disturbing possibility; that the national government would keep the militias too weak to resist the power of a future standing army.[37]

It is clear, in any case, that Congress was less than enthusiastic about a bill of rights and that some Antifederalists were disappointed with the Bill of Rights, including Virginians Richard Henry Lee and William Grayson, the former judging the amendments "much mutilated and enfeebled," the latter calling them "good for nothing."[38]

Dec. 20, 1787, July 31, 1788, Aug. 28, 1789, in Hutchinson et al., eds., *Madison Papers*, 10:336, 11:212-13, 12:364.

[37] "Essays of John DeWitt," in Storing, ed., *Complete Anti-Federalist*, 4:3.27-28; Martin's speech, in Jensen et al., eds., *Documentary History Ratification*, 14:290-91; Henry's speech, ibid., 91957-58; Mason's speech, ibid., 10:1270, 1271; Grayson's speech, ibid., 1306; Henry's speech, ibid., 1535. A Federalist writer correctly noted that the Antifederalists tried to have it both ways: they spoke of the dangers of the federal government's both arming and its failing to arm the state militias; "*The Landowner* No. X," ibid., 16:267.

[38] Richard Henry Lee to [Francis Lightfood Lee], Sept. 13, 1789, in James Curtis Ballagh, ed., *The Lessers of Richard Henry Lee*, 2 vols. (New York, 1911-1914), 2:500; Grayson to Henry, Sept. 29, 1789, in William Wirt Henry, ed., *Patrick Henry: Life, Correspondence, and Speeches*, 3 vols. (New York, 1891), 3:406. There is a disappointing lack of information about the public's reaction to Congress's proposed amendments that became the Bill of Rights, probably because there seems to have been strong public support for most of them. The subject is not even mentioned in Donald H. Stewart. *The Opposition Press of the Federalists Period* (Albany, N.Y., 1969), x, based on "nearly all" of the approximately 550 newspapers published between 1789 and 1801. The existing sources are mainly skeletal outlines of legislative measures. The ratification literature is listed and evaluated by Saladino, "The Bill of Rights: A Bibliographic Essay," in Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison), Wis., 1992), 484-85. The continued strength of Antifederalism in post-1788 Virginia

(Continued on following page)

Also opposed was Gerry of Massachusetts, like the two Virginians an Antifederalist member of the First Congress. Gerry singled out the militia amendment as his most serious objection to the Bill of Rights. He saw in it the continuation of a dangerous precedent that had begun with the militia provisions of the Constitution: the sacrificing of the states' total control of the militia to a central government that also had the authority to create a standing army. It reminded him of Britain's efforts during the earlier imperial crisis to keep the Massachusetts militia weak at the same time that royal troops were sent to coerce the Bay Colony.[39]

The new national charter remained in 1789 a skeleton to be fleshed out by laws and judicial interpretation.

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is discussed in Richard Beeman, *The Old Dominion and New Nation, 1788-1801* (Lexington, Ky., 1972), 61-66, and J. Gordon Hylton, "Virginia and the Ratification of the Bill of Rights, 1789-1791," *University of Richmond Law Review*, 25 (1991), 433-74 passim. These accounts suggest that Virginia Antifederalists were less interested in the Congressionally proposed individual rights amendments than in the absence of amendments that would have specifically restricted the powers of the federal government in its dealings with the states. Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Representatives, Sept. 28, 1789, cited in Beeman, *Old Dominion*, 61. In contrast, Georgia, whose convention unanimously ratified the Constitution appears to have taken the view, as reflected in the action of its legislature in rejecting the Bill of Rights, that amendments were premature until the people had a chance to observe the actual workings of the new government after the Constitution went into effect; Julia M. Bland, comp., *Georgia and the Federal Constitution: Proceedings of the State Constitutional Convention, and Proceedings of the State Legislature with Respect to the Amendments Proposed by the United States Congress on September 25, 1789* (Washington, D.C., 1937), 9-15.

[39] George Athan Billias, *Elbridge Gerry; Founding Father and Republican Statesman* (New York, 1976), 232-35; Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 182-84.

President Washington's administration encountered difficulty in getting Congress to implement the Constitution's provisions for bringing the state militias under federal jurisdiction for training. The reasons are complex and not always ideological. The large Federalist majority in the First Congress had refused to weaken Congress's control of the militia in the Second Amendment but was not of one mind about creating a centralized militia establishment.

Congressional divisions on that subject became apparent immediately after Secretary of War Knox, borrowing liberally from militia plans that he and Washington had advanced in the Confederation years, presented an implementation package to the national lawmakers in January 1790.[40] Stressing the need for quick legislative action because of Indian uprisings on the frontier, Knox once again called for a system of classing the militia by age and providing summer encampments and standardized weapons and equipment for the younger militiamen, who would constitute the elite class. Knox, like Washington and other former generals of the Continental army, knew that not all militiamen were well armed and familiar with their weapons.[41] Equally bold, and certainly unprecedented, was

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[40] Knox, "A Plan for the General Arrangements of the Militia of the United States," in Bickford, Bowling, Linda Grant DePauw, and Veit, eds., *Documentary History of the First Federal Congress*, 14 vols. to date (Baltimore, 1972-), 5:1435-57, hereafter cited as *Documentary History First Congress.*

[41] In 1794, Secretary of War Knox stated that of 450,000 men in the militias, probably 100,000 at most owned guns or had been supplied them by their states; *American State Papers: Documents, Legislative and Executive of the Congress of the United States*, class V, *Military Affairs.* 7 vols. (Washington, D.C., 1832-1861), 1:70. Several scholars are currently looking into the subjects of gun ownership and regulation in early America. None has yet produced a major study, but Michael A.

(Continued on following page)

Knox's recommendation that young men should be denied the full benefits of citizenship until they completed their terms of service in the elite class.

Knox's proposals produced heated opposition in and out of Congress. Critics asserted that classing and summer camps for younger men would be unworkable and exceedingly expensive. The cost, estimated at over $400,000 a year for the "advanced corps," prompted Benjamin Goodhue of Massachusetts, a Federalist member of the House of Representatives, to exclaim, "I believe Knox to be" nearly "the most extravagant man . . . living." Others called for exemptions for numerous occupations and for conscientious objectors, and they denounced Knox for stipulating that citizenship rights should be linked to compulsory military service.[42] According to a satirical piece in Benjamin Bache's Philadelphia *General Advertiser*, one Charlotte informed her friends Sophia and Thalestris that, because Quakers, tradesmen, students, and farmers sought exemptions from militia duty, "I suppose that we young women must learn militia duty, and turn out with

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Bellesiles has written two preliminary offerings. See "Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794," paper delivered at the Second Annual Institute of Early American History and Culture Conference, Boulder, Colorado. June 1, 1996, and "The Origins of Gun Culture in the United States, 1760-1865," JAH, 83 (1996), 425-55.

[42] As early as April 26, 1790, about 7 months before Congress formally debated the measure, Senator William Maclay of Pennsylvania predicted that it had no chance of adoption; Bowling and Veit, eds., *The Diary of William Maclay and Other Notes on Senate Debates, March 4, 1789-March 3, 1791* (Baltimore, 1988), 246-47. An excellent summary of the early reaction to Knox's plan is in Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York, 1975), 128-33, Goodhue quotation on 131.

both musquet and bayonet." Two authorities state that "nothing [the First Federal Congress] considered raised as much organized public opposition as Knox's militia plan."[43]

Congress backed off, taking the customary route of legislative bodies that seek to escape the heat: a committee drafted a bill, encouraged further public commentary, and put the controversial measure aside for months while lawmakers dealt with other divisive issues such as Hamilton's financial program and the location of the national capital.[44] The Knox legislation eventually limped through a succession of ad hoc committees in 1790 and 1791, each one further weakening its original contents. The first and only full debate on the much-revised militia bill terminated with the end of the First Congress in early 1791. The national legislators, hopelessly divided on the subject, went home without voting on it.[45]

When the Second Congress finally passed the Uniform Militia Act of 1792, it eliminated almost all the parts Washington and Knox considered crucial. The act lumped together all men between the ages of eighteen and forty-five in a huge, undifferentiated militia force, with every man responsible for securing his own weapon, regardless of its condition, unless the states elected to furnish arms. The law provided only loose guidelines for training and

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[43] Bickford and Bowling, *Birth of the Nation: The First Federal Congress, 1789-1791* (Madison, Wis., 1989), 82-83. For the satire on militia legislation see "C. to Mr. Bache," Philadelphia *General Advertiser*, Jan. 20, 1791; copy provided through the courtesy of Kenneth R. Bowling.

[44] *Documentary History First Congress*, 3:256-69 passim, 379, 484, 631-48 passim.

[45] First Congress militia debates, ibid., 14:48-189 passim.

organizing the militia under state, not federal, supervision. It provided no penalties if the states proved unwilling to enforce these guidelines.[46] The statute continued 'to be the basic structural legislation for the militia until the twentieth century, despite reform-minded efforts of various presidents. None made more persistent attempts than Thomas Jefferson, who addressed the matter in seven of his annual messages to Congress. Like Washington and Knox before him, Jefferson embraced the idea of Congress's classing the militia and supplying the best-trained component with standardized weapons. But when he persuaded lawmakers to consider the matter seriously in 1805-1806, he met a resounding defeat.[47]

Congress in 1792 also enacted the Calling Forth Act to define procedures for federalizing state militias. Some Federalists wanted to leave the decision to the president, but a majority of the lawmakers insisted on safeguards against hasty action by the administration. In the event of an insurrection against a state government, the act made it "lawful for the President . . . on the application of the legislature of such state, or the Executive (when the legislature cannot be convened)" to call out militia from other states. The new law also passed on some of Congress's power relative to executing national law to the

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[46] *Annals of Congress.* 2d. Congress, 1st Session, 103, 418-24, 436, 1392-95; *Statutes at Large,* 272.

[47] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents, 1789-1903*, 10 vols. (Washington, D.C., 1896-1899), 1:329, 345, 372, 385, 410, 428-29, 455: Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, 10 vols. (New York, 1892-1899), 8:409-12; *Annals of Congress*, 9th Congress, 1st Session, 69-70, 141, 327-30.

chief executive, mostly pertaining to when it was not in session. To act, however, the president needed notification from a federal judge that civil authority was inadequate to bring order. Furthermore, before ordering out militia, he had to issue a cease-and-desist proclamation.[48]

The first and greatest test case, practically and constitutionally, for the employment of the federalized militia came soon after Congress enacted the 1792 militia laws. In 1794, Washington called out 13,000 militiamen from four states to suppress the Whiskey Rebellion in western Pennsylvania, where angry farmers blocked the collection of a federal tax on distillers of spirituous liquors. Though Washington received criticism from within the emerging Republican Party, the protesters could hardly argue that the president had failed to remain inside the letter of the law; their concerns focused on the need to resort to force and the number of men taken into national service. Most congressmen, however, approved Washington's performance; he had delayed forceful means until after conciliation had apparently failed; he released most of the militiamen after a short time in arms; and he pardoned the two rebels convicted of treason.[49]

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[48] *Annals of Congress*, 2d Congress, 1st Session, 554-59, 574-80; 1 *Statutes at Large, 264.* See also for the 1792 militia legislation Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Washington, D.C., 1988), 19-23, and John K. Mahon, *History of the Militia and the National Guard* (New York and London, 1983), 51-54.

[49] There is a sizable literature on the Whiskey Rebellion. Accounts of the martial dimensions are in Kohn, *Eagle and Sword, 157-73;* Coakley, *Role of Federal Military Forces*, chaps. 3-4; and Bennett Milton Rich, *The Presidents and Civil Disorder* (Washington, D.C., 1941), chap. 2. The subject is treated more broadly in Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh,

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Congress subsequently reinforced and strengthened the "calling forth" authority of the federal government in general and of the president in particular. Revising the Calling Forth Act in 1795, it made the law permanent and deleted the stipulations that the president, before implementing part of it, had to obtain a judicial certificate and secure Congressional approval if the lawmakers were in session.[50] In 1799, President John Adams, displaying less hesitancy than Washington in 1794, dispatched federalized militia to put down Fries Rebellion in Pennsylvania where, again, an unpopular federal tax generated agrarian resistance. Even Jefferson, who had faulted both Washington and Adams for federalizing militia for use against Pennsylvania farmers, when president followed their lead during the Burr Conspiracy and again during the disorders stemming from his controversial Embargo in 1807.[51] Once the leaders of both political parties had turned to federalized militia, the question of employing that military force to maintain or restore domestic tranquility could hardly arouse as much dispute as a party issue as it had in the 1790s.

Remaining constitutional issues were resolved by the Supreme Court under Chief Justice John Marshall in the 1820s. From time to time, militia had been reluctant or unwilling to serve the federal government. President Jefferson had a greater problem in this respect than his predecessors, owing to the extreme unpopularity of the

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1939), and Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York, 1986).

[50] 1 *Statutes at Large*, 422.

[51] W.W.H. Davis, *The Fries Rebellion, 1798-99* (Doylestown, Pa., 1899); Coakley, *Role of Federal Military Forces*, 69-77.

Embargo in New England, and Federalists saw danger in Congress's enabling Jefferson to deploy both the army and the militia to enforce the Embargo. The Massachusetts legislature condemned Jefferson's assembling militia at the ports as "irregular, illegal, and inconsistent with the principles of the constitution . . . subversive of the militia system, and highly dangerous to the liberties of the people."[52] In *Houston v. Moore* (1820), the Supreme Court ruled that a militiaman who refused to respond to a federal call-up violated national law. Justice William Johnson, in a concurring opinion, found the central government empowered to stipulate "both the officer and private who shall serve, and to call him forth or punish him for not coming."[53] Even more sweeping was the court's unanimous decision in *Martin v. Mott* (1827) that, in the words of Justice Joseph Story, upheld the constitutionality of all portions of the Calling Forth Act of 1795. Addressing concerns about presidential tyranny, Story declared that it must be assumed that chief executives would demonstrate "public virtue and honest devotion to the public interests." He added that Congressional oversight and frequent elections would ever "guard against usurption or wanton tyranny."[54]

The settlement of constitutional questions about militia control hardly guaranteed that Americans would

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[52] *2 Statutes at Large*, 506. Massachusetts General Court, quoted in Coakley, *Role of Federal Military Forces*, 89. Jefferson's military enforcement of the Embargo is criticized in Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass., 1963), chaps. 5-6, and viewed somewhat sympathetically in Dumas Malone, *Jefferson the President Second Term. 1805-1809* (Boston, 1974), chaps. 28, 32-35.

[53] 5 Wheat 1, 12-32, 37 (U.S., 1820).

[54] 12 Wheat, 19, 29-39 (U.S., 1827).

live comfortably with the outcome. Rather, a combination of laws and judicial opinions and the infrequency of federal militia call-ups explain why the militia-control issue in peacetime became moot. Since the time of Jefferson's Embargo, the central government has seldom assembled state units under its direction, and in every instance they have acted in conjunction with troops of the United States army.[55] For ninety years following the Civil War – from 1867 to 1957 – although often activated by a state to maintain order, the militia saw no federal service in internal disturbances. Beginning in the latter year and continuing into the next decade, the militia, by then known as the National Guard, performed short-term duty in enforcing racial integration in the South and restoring order in several northern cities racked by racial violence. Since the 1960s, the Guard's responsibilities have been carried out under state jurisdiction, with only a single two-day exception in Arkansas in 1980.[56]

The antifederalists lost the battle but, in a sense, won the war. They largely prevailed in that the federal government showed small interest in federalizing the militia for domestic reasons or in subjecting it to intensive training overseen by the national military establishment. Presidential administrations have not dispatched militiamen from

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[55] Coakley, *Role of Federal Military Force*, is a detailed account covering the years through Reconstruction, the first of a projected three-volume work on military interventions.

[56] Robin Higham, ed., *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, 2d ed. (Manhattan, Kan., 1989), although comprehensive, focuses on post-Civil War activity. See also Jerry M. Cooper, "Federal Military Intervention in Domestic Disorders," in Kohn, ed., *The United States Military under the Constitution of the United States. 1789-1989* (New York, 1993), 120-50.

one end of America to the other or, typically, kept them on duty for more than a few days to a few months. With the major exception of the Civil War, federal law could normally be upheld and enforced by civil authorities and by the judiciary. Strong sentiments of localism and states' rights also are factors that worked against federalizing the militia and subjecting it to demanding training. So too is the fact that America hardly had an activist government in Washington, D. C., before the twentieth century.

Ironically, state control, a reality during by far the greater part of American history, failed to produce the positive results that its admirers predicted. Although Antifederalists feared that national authorities either would fail to train the militia or would remove it from the states, the truth is, as the Federalists maintained at the time, the states could train their militias above and beyond whatever regulation the central government imposed. The states have displayed scant initiative in providing substantial appropriations and rigorous training for their units – to the point that, by 1861, save for volunteer units (usually elitist in character), the state militias had virtually ceased to exist, especially in the South, and they revived but slowly after the Civil War.[57] The deterioration of the militias provides the explanation why, after the War of 1812, the federal government took into active service in time of national conflict very few militia units as such prior to the twentieth century, preferring instead to

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[57] Mahon, *History of the Militia and the National Guard*, chaps. 6, 8; Higginbotham, "The Martial Spirit in the Antebellum South; Some Further Speculations in a National Context," *J. Southern Hist.*, 58 (1992), 3-26; Kenneth Otis McCreedy, "Palladium of Liberty: The American Militia System, 1815-1861" (Ph. D. diss., University of California at Berkeley, 1991).

fight its wars with the regular army and federal volunteers.

Nor has state control insured that the militia would be the bulwark of liberty its proponents had claimed it to be from the time of seventeenth-century English opponents of the Stuarts through the colonial period and the Revolution to the Antifederalists and beyond. When called out by state authorities, the militia and the National Guard have often been accused of heavy-handed behavior against various minorities, including Catholics in antebellum cities, labor unionists, Native Americans, Asian Americans, African Americans, and Vietnam War protesters.[58]

The militia and National Guard never served as splendid repositories of freedom and equality. They were

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[58] Robert Reinders, "Militia and Public Order in Nineteenth-Century America," *Journal of American Studies*, 11 (1977), 81-101; Mahon, *History of the Militia and National Guard*, chaps. 6, 8, 16; Stephen E. Ambrose, "The Armed Forces and Civil Disorder," in Ambrose and James A. Barber, Jr., eds., *The Military and American Society: Essays and Readings* (New York, 1972), 241-48. Few state Guards displayed more partisan behavior than that of Colorado. See Alvin R. Sunseri, "The Ludlow Massacre: A Study in the Misemployment of the National Guard," *American Chronicle A magazine of History*, 2 (1972), 21-28; Clarence C. Clendenon, "Super Police: The National Guard as a Law Enforcement Agency in the Twentieth Century," In Higham, ed., *Bayonets in the Streets*, 90-91; George G. Suggs, Jr., *Colorado's War on Militant Unionism James H. Peabody and the Western Federation of Miners* (Detroit, 1972); and Alan M. Osur, "The Role of the Colorado National Guard in Civil Disturbances," *Military Affairs*, 46 (1982), 19-24. At least 3 Vietnam-era studies address the Guard's performance on the homefront. *Report of the National Advisory Committee on Civil Disorders* (New York, 1968), 497-506; American Civil Liberties Union, *The National Guard and the Constitution* (New York, n.d.); and Renata Adler, "A Reporter at Large," *The New Yorker*, 46 (Oct. 3, 1970), 40-64, which in some respects remains the most penetrating analysis of the Guard's domestic role at the time.

highly politicized instruments that reflected majoritarian views in the states, except during Reconstruction. Because governors or legislatures appointed general and staff officers, political affiliation became a critical factor in the selection process; this can be seen as early as 1802 in Tennessee when Andrew Jackson won the post of commanding general over John Sevier. The opportunity to be a member of the Guard has always been influenced by political factors. Just as some antebellum northern states limited participation to non-Irish whites, so blacks by 1900 had all but disappeared from the Guard in the southern states. Conversely, the Guard became a haven for countless young men seeking to avoid the draft during the Vietnam War, their ability to join often depending on their having political or social connections.[59]

Since the adoption of the Constitution in 1788, control of the militia has never been an either-or matter. It rarely received a call-up for peacetime domestic duty. Patrick Henry, who doubted that concurrent powers could work, was wrong, but for reasons he could not have foreseen, which have been enumerated in this essay. Rather than becoming

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[59] Mahon, *History of the Militia and National Guard*, chap. 8 passim, 149, 211, 236-37, 243, 246, 264; Willard B. Gatewood, Jr., "North Carolina's Negro Regiment in the Spanish-American War," *North Carolina Historical Review*, 48 (1971), 370-87. On none of the 4 major occasions the Guard was called out by state governors in the 1950s to deal with racial strife are blacks known to have served; W. Ronald Wachs, "Off Guard": The National Guard and Race Relations in the 1950s" (Ph. D. diss., University of North Carolina at Chapel Hill, 1977), 416. The political activities of the militia and National Guard, especially at the federal level, are developed in William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Washington, D. C. 1957)., and Martha Derthick, *The National Guard in Politics* (Cambridge, Mass., 1965).

agents of oppression in the name of the national government, as Antifederalists feared, the militia and National Guard have more often been agents of state-level discrimination against minorities, in acting against such elements, excluding them from joining the state forces, or both.[60]

James Madison, at the Constitutional Convention and in The Federalist No. 10, declared that personal rights were more likely to be endangered by the state governments than by the national government. That is why he included in his initial draft of the Bill of Rights in the House an amendment that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (Though this prohibition failed to gain the Senate's approval, Madison considered it "the most valuable amendment on the whole list.")[61] Hence, in still another way, the Antifederalists were mistaken in believing, as they did, that freedom was more secure in small, homogeneous republics. History vindicates Madison's new and daring counterargument of 1787: namely, that rights are more secure in large and diverse republics in which majorities are slow to form and thus have difficulty discriminating against minorities. The history of the militia and the National Guard, viewed from a comparison of their federal and state services, points in that direction.

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[60] Perhaps the harshest scholarly judgment is in Ambrose, "Armed Forces and Civil Disorder," 241-48.

[61] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 13, 41, 41 n 59, 188.

Analysis of State Constitutional "Right to Keep and Bear Arms" Provisions

[Originally Prepared For American Bar Association Special Committee on Gun Violence, Second Amendment Program, ABA Annual Convention, 2003]

States (42) with constitutional "right to bear arms" provisions where the text specifically describes an individual right (by using words such as "person" "individual" "citizen") and/or where the courts have interpreted the provision to protect an individual right (key provided on page 2):

Maine *
Vermont =
New Hampshire**
Connecticut*
Delaware=
Pennsylvania*
Virginia= upheld ordinance requiring permit for handgun purchase
West Virginia*
Ohio!*
Georgia*
North Carolina*
South Carolina=
Florida*
Kentucky*
Tennessee*right to exercise police power to regulate "wearing" of arms; right to keep arms a private right, right to bear arms a political right
Alabama*
Michigan*
Indiana*
Mississippi*
Wisconsin!*
Illinois*

Missouri*
Arkansas*
Louisiana*
Nebraska*
Oklahoma*
Texas*
Montana!=
Wyoming*
Colorado*
New Mexico*
Idaho – the constitutional provision states what regulations are acceptable
Utah* prior clause, new clause states nothing herein shall prevent Legislature from defining the lawful use of arms
Arizona*
Oregon*
Nevada, individual right, no cases
Alaska **
Hawaii*
South Dakota=
North Dakota*
Washington*
Rhode Island (right to keep arms is individual right)*

Key:

* courts have used a reasonableness test in determining whether a regulation infringes impermissibly on the right
! courts have explicitly held the right is fundamental
** courts have explicitly held the right is subject to regulation provided the restriction narrowly serves a significant state interest
= courts have held the right is not absolute or unlimited but have not yet defined level of scrutiny

42 states with provisions protecting individual right to possess firearms; in 32 of these the courts have held the right is subject to reasonable regulation in the exercise of the state's police power, including in Ohio and Wisconsin where the courts have also held explicitly that the right is fundamental, and in Colorado where the state supreme court stated it was unnecessary to decide if the right is fundamental, it is subject to reasonable regulation; in 7 of these states the courts have held the right is not absolute but have not defined level of scrutiny; in 2 states, Alaska and New Hampshire, the courts have required a narrow means/substantial state interest test

The following states do not have a state constitutional right to bear arms clause:

California
Iowa
New York
New Jersey
Maryland
Minnesota

The following states have a constitutional right to bear arms or militia clause interpreted as collective, militia-based:

Massachusetts
Kansas

Specific provisions and relevant case law now found at http://www.firearmslawcenter.org